United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

VOLUME 3 — TRIAL TRANSCRIPT — Pages 1 to 328-8

UNITED STATES COURT OF APPEALS
FILED
MAY 19 1976
A. DANIEL FUSARO, CLERK

CRAVATH, SWAINE & MOORE
Attorneys for Plaintiff-Appellant
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3000

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
(212) 644-8000

BERNARD KORMAN, Esq.
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Defendants-Appellees
ASCAP, et al.

HUGHES HUBBARD & REED
Attorneys for Defendants-Appellees
Broadcast Music, Inc., et al.
One Wall Street
New York, New York 10005
(212) WH 3-6500

STROOCK & STROOCK & LAVAN
Attorneys for Defendant-Appellee
Warner Bros. Inc.
61 Broadway
New York, New York 10004
(212) 425-5200

SIMPSON THACHER & BARTLETT
Attorneys for Defendants-Appellees
MCA, Inc., and Duchess Music Corp.
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

LINDEN & DEUTSCH
Attorneys for Defendants-Appellees
G. Schirmer, Inc., and
Associated Music Publishers, Inc.
110 East 59th Street
New York, New York 10022
(212) 758-1100

HOFHEIMER, GARTLIR,
GOTTLIEB & GROSS
Attorneys for Defendants-Appellees
Essex Music, Inc., and
Hollis Music, Inc.
100 Park Avenue
New York, New York 10017
(212) 725-0400

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

COURT PAPERS

VOLUME 1

	PAGE
Docket Entries	JA1
Complaint	JA19
Exhibit A	JA31
Exhibit B	JA33
Exhibit C	JA35
ASCAP Answer and Counterclaim	JA37
Excerpts from BMI's Answer and Counterclaim	JA64
Reply to ASCAP's Counterclaim	JA79
Reply Memorandum in Support of BMI's Motion for Preliminary Injunction, dated July 9, 1970	JA94
Appendix	JA115
Transcript of Proceedings of July 10, 1970	JA132
Affidavit of Amalya L. Kearse, sworn to April 26, 1971	JA170
Excerpts from Appendix to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, dated August 16, 1971	JA177
ASCAP's Reply Memorandum in Support of its Motion for Summary Judgment, dated September 3, 1971	JA185
Transcript of Proceedings of September 14, 1971	JA197

VOLUME 2

PAGE

Excerpts from Plaintiff's Memorandum in Support of Its Rule 37 Motion to Compel Answers to Interrogatories, and Production of Documents, dated August 25, 1972 ..... JA305

ASCAP Memorandum in Opposition to CBS' Motion to Compel Answers to Interrogatories and Production of Documents, dated September 27, 1972 ..... JA314

Excerpts from CBS' Memorandum in Opposition to ASCAP's Motion for a Protective Order dated September 29, 1972 JA338

Excerpts from ASCAP's Trial Brief dated April 25, 1973 ..... JA342

Excerpts from BMI Trial Memorandum dated April 25, 1973 JA353

Excerpts from Plaintiff's Post-trial Brief dated April 8, 1974 JA358

Excerpts from ASCAP's Post-trial Brief dated June 3, 1974 JA361

BMI's Post-trial Brief dated June 3, 1974 ..... JA370

Opinion and Order of Lasker, J. dated September 22, 1975 ..... JA584

TRIAL TRANSCRIPT*

VOLUME 3

	PAGES
Donald Sipes:	
Direct	14–149
Cross	150–328

VOLUME 4

Donald Sipes (concluded)	
Cross (concluded)	329–379
Redirect	380–381
Recross	382–397
Robert B. Wright:	
Direct	397–475
Cross	476–553
Redirect	553–560
Recross	561–562

* Corrections to the trial transcript appear at the close of each day's transcript:

pages of transcript	*corrections at pages*	*pages of transcript*	*corrections at pages*	*pages of transcript*	*corrections at pages*
1 to 127	127-1 to 127-8	1799 to 1954	1954-1 to 1954-4	3576 to 3748	3748-1 to 3748-12
128 to 328	328-1 to 328-8	1955 to 2108	2108-1 to 2108-7	3749 to 3919	3919-1 to 3919-13
329 to 563	563-1 to 563-6	2109 to 2458	2458-1 to 2458-10	3920 to 4081	4081-1 to 4081-9
564 to 753	753-1 to 753-5	2459 to 2623	2623-1 to 2623-6	4082 to 4241	4241-1 to 4241-10
754 to 908	908-1 to 908-4	2624 to 2801	2801-1 to 2801-5	4242 to 4426	4426-1 to 4426-10
909 to 1089	1089-1 to 1809-4	2802 to 2995	2995-1 to 2995-16	4427 to 4613	4613-1 to 4613-11
1090 to 1273	1273-1 to 1273-4	2996 to 3176	3176-1 to 3176-8	4614 to 4731	4731-1 to 4731-5
1274 to 1445	1445-1 to 1445-6	3177 to 3378	3378-1 to 3378-14	4732 to 4873	4873-1 to 4873-14
1447 to 1632	1632-1 to 1632-5	3379 to 3524	3524-1 to 3524-5		
1633 to 1798	1798-1 to 1798-8	3525 to 3575	3575-1 to 3575-2		

PAGES

Edward Duke Vincent:
Direct 571–647
Cross 647–671

VOLUME 5

Edward Duke Vincent (concluded):
Cross (concluded) 672–726
Redirect 726–730

George A. Sunga:
Direct 731–759
Cross 759–770

Albert Berman:
Direct 771–851a
910–965
Cross 965–977
Redirect 978–987

Marion B. Mingle:
Direct 852–885
Cross 885–888
Redirect 888–889
Recross 889–890

Burton Lane:
Direct 988–999

VOLUME 6

Burton Lane (concluded):
Direct (concluded) 1000–1160
Cross 1161–1172
Redirect 1172–1176

Allen H. Arrow:
Direct 1255–1360

VOLUME 7

	PAGES
Allen H. Arrow (continued):	
Direct (concluded)	1361–1536
Eugene Goodman:	
Direct	1537–1592
Cross	1593–1600
Leon Kellman:	
Direct	1604–1631

VOLUME 8

Franklin M. Fisher:	
Direct	1636–1767
Cross	1768–1785
Walter L. Dean:	
Direct	1799–1823
Cross	1824–1861
Redirect	1862–1865
Allen H. Arrow (concluded):	
Cross	1962–1996
Redirect	1997–2003
Recross	2003–2005
Further Redirect	2006
Irwin Segelstein:	
Direct	2009–2032
Cross	2032–2042

VOLUME 9

Emil Poklitar:	
Direct	2044–2074
Cross	2074–2100
Redirect	2101–2102
Paul Marks:	
Direct	2400–2571
Cross	2571–2623

VOLUME 10

	PAGES
Paul Marks (concluded):	
Cross (concluded)	2624–2728
Salvatore Chiantia:	
Direct	2854–2910
Cross	2910–2932

Volume 11

Salvatore Chiantia (concluded):	
Cross (concluded)	2933–3058
Redirect	3058–3062
Recross	3062–3064
Alan Shulman:	
Direct	3065–3096
Cross	3097–3136
Redirect	3137–3138

VOLUME 12

Michael Dann:	
Direct	3213–3299
Cross	3299–3378
	3411–3439
John Green:	
Direct	3440–3460
Cross	3460–3476
Aaron Copland:	
Direct	3478–3487

PAGES

Arnold Broido:
Direct 3488–3497
Cross 3497–3501

VOLUME 13

Herman Finkelstein:
Direct 3577–3660
Cross 3660–3829
Redirect 3829–3837

Robert R. Nathan:
Direct 3842–3919

VOLUME 14

Robert R. Nathan (continued):
Direct (continued) 3920–3968
Cross 3969–4206

Paul Marks:
Direct 4207–4221
Cross 4221–4241

VOLUME 15

Edward Cramer:
Direct 4244–4289
Cross 4290–4358

Paul Rosenthal:
Direct 4358–4375
Cross 4376
Redirect 4376
Recross 4377–4378

Peter Q. Steiner:
Direct 4378–4420
Cross 4420–4473
Redirect 4473–4475
Recross 4475–4480

Robert R. Nathan (concluded):
Direct (concluded) 4526–4556
Cross (concluded) 4557–4613

VOLUME 16

	PAGES
Fred Silverman:	
Direct	4733–4759
Cross	4759–4766
Redirect	4766
Franklin M. Fisher:	
Direct	4767–4852
Cross	4853–4863
Redirect	4863–4864

DEPOSITIONS

VOLUME 17

	PAGE
Excerpts from the Deposition of Stanley Adams	D1
Excerpts from the Deposition of Allen H. Arrow	D66
Excerpts from the Deposition of Al Brackman	D70
Excerpts from the Deposition of Leon Brettler	D111
Excerpts from the Deposition of Salvatore Chiantia	D263

VOLUME 18

Excerpts from the Deposition of Cy Coleman	D331
Excerpts from the Deposition of Paul Fagan	D347
Excerpts from the Deposition of Herman Finkelstein	D546
Excerpts from the Deposition of Sidney Herman	D624

VOLUME 19

PAGE

Excerpts from the Deposition of Edwin H. Morris D641

Excerpts from the Deposition of William S. Paley D761

Excerpts from the Deposition of Emil D. Poklitar D766

Excerpts from the Deposition of Frank Stanton D852

Excerpts from the Deposition of Jerry Vogel D911

Excerpts from the Deposition of Ned Washington D938

Excerpts from the Deposition of Philip B. Wattenberg D991

Excerpts from the Deposition of Robert D. Wood D1013

EXHIBITS

VOLUME 20

Court Exhibit ("CX") No. 2—Stipulation between CBS and ASCAP, dated 5/25/72, in this action E1

CX 2, Exhibit No. 1—Standard form of CTN "Television Affiliation Agreement", dated 2/66 ..... E11

CX 2, Exhibit No. 2—Standard form of ASCAP writer and publisher membership agreement, Form 10M-1-72U, covering the years 1966-1975 ..... E19

CX 2, Exhibit No. 3—Standard forms of ASCAP "Application for Writer-Membership", Form 4M 11-71, with attached form of cover letter, and "Application for Publisher Membership", Form 2M 6-71, with attached form of cover letter E24

CX 2, Exhibit No. 4—Standard form of ASCAP writer and publisher membership agreement, Form 2500 7-65, covering the years 1941-1965 ..... E36

CX 2, Exhibit No. 5—Form of ASCAP "Television Performing Rights Agreement", supplementing the membership agreement (CX 2, Ex. 4) to include television performing rights E41

PAGE

CX 2, Exhibit No. 6—List of "ASCAP Affiliated [Foreign] Repertories", dated 1972 ..... E44

CX 2, Exhibit No. 7—Form of ASCAP Performing Rights Agreement used in connection with the foreign performing rights licensing societies listed in CX 2, Ex. 6 above, wherein ASCAP grants rights to licensee E46

CX 2, Exhibit No. 8—Form of ASCAP Performing Rights Agreement used in connection with the foreign performing rights licensing societies listed in CX 2, Ex. 6 above, wherein licensor grants rights to ASCAP E56

CX 2, Exhibit No. 9—"Articles of Association of the American Society of Composers, Authors and Publishers", dated 1/70 E68

CX 2, Exhibit No. 10—Amended Consent Judgment, dated 3/14/50. *U.S.* v. *ASCAP* (Civil Action No. 13-95) E124

CX 2, Exhibit No. 11—Order, dated 1/70/60, and attachments as amended to date in *U.S.* v. *ASCAP* (Civil Action No. 13-95) E139

CX 2, Exhibit No. 12—Pamphlet, whose cover is a letter, dated 6/28/63, from Stanley Adams "To All Members of the Society", describing the pamphlet's contents as "The ASCAP Survey" by Dr. Joel Dean, which Judge McGeehan suggested be distributed to all ASCAP members E209

CX 2, Exhibit No. 13—ASCAP Financial Statements for the calendar years 1960-1969, with attached cover letters from Stanley Adams to "Dear Member", dated 4/11/61, 4/19/62, 4/1/63, 4/18/64, 4/15/65, 4/20/66, 4/24/67, 4/4/68, 4/2/69, 4/9/70, respectively E254

CX 2, Exhibit No. 14—Standard forms of ASCAP license agreements, currently in effect:

Title	*Form No.*
Local Station Blanket Radio License	5M-11-69-U
Local Station Per Program Radio License	7500-9-67
Local Station Blanket Television License Agreement	—
Local Station Per Program Television License Agreement	— E285

CX 2, Exhibit No. 15—Standard forms of ASCAP license agreements, preceding the current forms (CX 2, Ex. 14):

PAGE

Title	*Form No.*	
Local Station Blanket Radio License	3M-3-67	
Local Station Program Sustaining License	160	
Local Station Blanket Television License	1M-12-67	
Local Station Per Program Television License	1000 Jan. 1967(u)	E354

VOLUME 21

CX 2, Exhibit No. 16—Certificate of Incorporation of Broadcast Music, Inc., dated 10/13/39 ..... E371

Court Exhibit No. 3—Stipulation between CBS and BMI in *CBS* v. *ASCAP*, dated 10/15/71 ("So Ordered 10/26/71") E386

Plaintiff's Exhibit No. 12—Finkelstein Affidavit, dated 6/25/70 in *U.S.* v. *ASCAP (NBC Application)* E390

Plaintiff's Exhibit No. 14—Finkelstein Affidavit, dated 7/10/70 in *U.S.* v. *ASCAP (NBC Application)* E405

Plaintiff's Exhibit No. 24—Excerpts from ASCAP Brief on Appeal, dated 3/30/71, *United States* v. *ASCAP* (*Matter of Zekley*) E415

Plaintiff's Exhibit No. 53—AGAC Uniform Popular Songwriters Contract, bearing copyright dates: 1948 (SPA) and 1969 (AGAC) E430

Plaintiff's Exhibit No. 84—Letter dated 10/29/59 from Salvatore Chiantia to Miriam Stern E439

Plaintiff's Exhibit No. 102—Post-1970 pamphlet, "ASCAP—The Facts" E441

Plaintiff's Exhibit No. 106—Stanley Adams' "Remarks—AGAC Meeting, Hotel Edison, October 28" E448

Plaintiff's Exhibit No. 123—Letter dated 11/4/65 from Harold Spina to Miriam Stern E458

Plaintiff's Exhibit No. 124—Letter dated 11/19/65 from Michael H. Goldstein to Burton Lane E461

Plaintiff's Exhibit No. 125—Memorandum dated 1/24/66 from Abel Baer to Donald Kahn enclosing AGAC Counsel "Report to the West Coast Committee" dated 1/12/66 ..... E465

Plaintiff's Exhibit No. 127—Memorandum dated 4/22/66 from Leon Kellman to Burton Lane E470

PAGE

Plaintiff's Exhibit No. 133—Excerpt from "Report to New York AGAC Counsel from the West Coast Committee" dated 5/11/67 ..... E475

Plaintiff's Exhibit No. 134—Letter dated 5/18/67 from Burton Lane to Vic Mizzy E477

Plaintiff's Exhibit No. 135—Memorandum dated 7/25/67 from Burton Lane to AGAC West Coast Committee E480

Plaintiff's Exhibit No. 137—Excerpt of Report of the AGAC West Coast Committee Meeting dated 5/10/66 ..... E484

Plaintiff's Exhibit No. 162—Memorandum dated 10/19/59 from Miriam Stern to Alan Shulman enclosing Lane-Bernstein letters 10/2/59, 10/6/59, 10/14/59 and 10/15/69 ..... E486

Plaintiff's Exhibit No. 405—Blanket Network Television License Agreement between NBC and ASCAP, dated 1/10/58 as of 1/1/58, covering the period 1/1/58 through 12/31/61 (furnished by ASCAP as Exhibit M in connection with ASCAP Answer, dated 6/30/70 to CBS Interrogatory 28) E491

Plaintiff's Exhibit No. 430—ASCAP Supplementary Answer, dated 3/15/73, to CBS Interrogatory No. 26 ..... E533

Plaintiff's Exhibit No. 442—Form of BMI publisher affiliation agreement used from January 1959 to March 1969 (furnished by BMI as Exhibit 1 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory No. 9) E537

Plaintiff's Exhibit No. 443—Two forms of BMI publisher affiliation agreement used from March 1969 to August 1970 (furnished by BMI as Exhibit 2 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory No. 9) E543

Plaintiff's Exhibit No. 449—Two forms of BMI writer affiliation agreement used from December 1968 to July 1970 (furnished by BMI as Exhibit 8 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory 9) E552

PAGE

Plaintiff's Exhibit No. 458—BMI Answer, dated 3/23/73, to CBS Interrogatory No. 26 ..... E561

Plaintiff's Exhibit No. 469—BMI Writer Payment Schedule in effect as of January 1, 1972 (Dated September 1972) E563

Plaintiff's Exhibit No. 470—BMI Publisher Payment Schedule in effect as of January 1, 1972 (Dated September 1972) E570

Plaintiff's Exhibit No. 471A—BMI-Publisher Affiliation Agreement with a publisher where no previous agreement between the parties existed E577

Plaintiff's Exhibit No. 471B—BMI-Publisher Affiliation Agreement with a publisher canceling and superseding any prior agreement between the parties E582

Plaintiff's Exhibit No. 472—Current form of BMI-Writer Affiliation Agreement E587

Plaintiff's Exhibit No. 513—Affidavit of Edward M. Cramer, in this action, dated 10/21/70 ..... E592

Plaintiff's Exhibit No. 517—Memorandum of defendants ASCAP, et al. (by Paul Weiss), dated 11/10/71, in this action E598

Plaintiff's Exhibit No. 567—Excerpts from Statement of Herman Finkelstein, General Attorney for ASCAP on Hearing Before Special Subcommittee of the Judiciary Committee of the House of Representatives in Connection with Its Study of the Anti-Trust Laws, September 18, 1956 ..... E606

Plaintiff's Exhibit No. 568—Excerpts from Deposition of H. Finkelstein in *Cascade Broadcasting Co.* v. *ASCAP* E611

Plaintiff's Exhibit No. 572—Excerpts from deposition of Edward Cramer in *BMI* v. *NBC* E627

Plaintiff's Exhibit No. 575—ASCAP's Reply Memorandum (by Sullivan & Cromwell) dated 5/1/70, *United States* v. *ASCAP (Application of NBC)* E633

PAGE

Plaintiff's Exhibit No. 579—BMI pamphlet, "You—and the Music You Use", dated 7/69 ..... E646

Plaintiff's Exhibit No. 689—Letter dated 10/29/64 from Allen Arrow to George Lee E652

Plaintiff's Exhibit No. 722—AGAC Bulletin dated May 1966, Volume 3, No. 2 ..... E655

Plaintiff's Exhibit No. 839—Music Study, Summaries of Transactions, Songs and Plays of All Performances for 17 ASCAP Publisher Groups E660

Plaintiff's Exhibit No. 840—Music Study, Summaries of Transactions, Songs and Plays of Feature and Qualifying Performances for 17 ASCAP Publisher Groups E671

Plaintiff's Exhibit No. 866—Draft, dated 11/1/65 of 3MPX 27 ..... E682

Plaintiff's Exhibit No. 899—Respondent's Conditional Offer of Proof, 4/17/62, *U.S.* v. *ASCAP (Shenandoah)* E692

VOLUME 22

Plaintiff's Exhibit No. 900—Transcript of 34th Annual Meeting of AGAC, November 1965 ..... E731

Plaintiff's Exhibit No. 908—Affidavit of Michael Dann, sworn to July 7, 1970, in this action E808

Plaintiff's Exhibit No. 962—H. Finkelstein Affidavit 12/21/61, in *U.S.* v. *ASCAP (Shenandoah)* E815

Plaintiff's Exhibit No. 986—Letter dated November 12, 1971, from Alan J. Hruska to Jay H. Topkis E825

Plaintiff's Exhibit No. 987—Letter dated November 18, 1971, from Jay H. Topkis to Alan J. Hruska E829

Plaintiff's Exhibit No. 992—Letter from Allan Blumstein to Alan J. Hruska dated February 12, 1974 ..... E831

3MPX No. 2—Memorandum dated 7/6/64, "ASCAP Performance Fee Proposal; 3M-700 Outright Sale Unit" E833

PAGE

3MPX No. 4—Letter dated 8/18/64 from J.M. Collins to Allen Arrow E838

3MPX No. 7—Letter dated 8/27/64 from J. M. Collins to Allen Arrow E840

3MPX No. 11—Memorandum "Tentative Proposal to ASCAP from 3M for Use in Connection with the 3M-700 Series" E842

3MPX No. 18—Letter dated 6/28/68 from Allen Arrow to M.E. Ricketts E845

3MPX No. 19—Letter dated 7/4/68 from Mr. M.E. Ricketts to Allen Arrow E847

3MPX No. 27—Letter dated 11/15/65 from Burton Lane to "Dear Publisher" E849

3MPX No. 42—Memorandum dated 12/28/74 from Allen Arrow to Milton Kramer E853

3MPX No. 43—Memorandum dated 1/12/65 from Milton Kramer to Allen Arrow E858

3MPX No. 47—Letter dated 7/15/65 from Alan L. Shulman to Allen Arrow E860

3MPX No. 49—Letter dated 10/11/65 from Allen Arrow to R.E. Lindgren E862

3MPX No. 72—Letter dated 11/17/65 from Lee V. Eastman to Allen Arrow E864

3MPX No. 75—Letter dated 4/22/66 from Allen Arrow to R.E. Lindgren E866

3MPX No. 144—Letter dated 11/5/64 from R.E. Lindgren to Arthur Israel E871

3MPX No. 145—Letter from E. C. Timberlake to A. Arrow, dated 12/1/64 ..... E874

3MPX No. 168—Memorandum dated 11/19/65 from Alan Shulman to Harold Richmond E879

PAGE

3MPX No. 171—Letter dated 12/4/64 from Allen Arrow to Phillip B. Wattenberg enclosing copy of a letter dated 11/27/64 from R. E. Lindgren to M. E. Ricketts E881

ASCAP Exhibit No. 126—CBS-BMI Television Network Blanket License dated 1950 with letters extending to 1969 ..... E888

ASCAP Exhibit No. 127—CBS-ASCAP TV Network Blanket License Agreements dated 10/17/49, 2/19/54 ..... E907

VOLUME 23

ASCAP Exhibit No. 127 (concluded)—CBS-ASCAP TV Network Blanket License Agreements dated 1/10/58 and 12/19/69 1042

ASCAP Exhibit No. 175—ASCAP-ABC Blanket License for ABC Television Network dated 1/10/58 ..... E1138

ASCAP Exhibit No. 184—Letter dated 10/2/59 from Burton Lane to "Gentlemen" E1229

ASCAP Exhibit No. 193—Contract dated November 5, 1965, between 3M and Fred Ahlert Music Corp. E1231

ASCAP Exhibit No. 194—Contract dated November 5, 1965, between 3M and Ahlert-Burke Corp. E1244

ASCAP Exhibit No. 195—Contract dated August 23, 1965, between 3M and Barton Music Corp. E1257

ASCAP Exhibit No. 196—Contract dated January 22, 1965, between 3M and Bourne Co. E1268

ASCAP Exhibit No. 197—Contract dated October 1, 1965, between 3M and Brandom Music Corp. E1278

ASCAP Exhibit No. 198—Contract dated February 2, 1966, between 3M and Chippendale Music Co. E1289

VOLUME 24

PAGE

ASCAP Exhibit No. 199—Contract (unexecuted) dated June 1, 1965, between 3M and Compton Music Corp. E1300

ASCAP Exhibit No. 201—Contract dated June 5, 1965, between 3M and Consolidated/Dorsey Bros. E1309

ASCAP Exhibit No. 202—Contract dated July 26, 1965, between 3M and Criterion Music Corp. E1319

ASCAP Exhibit No. 203—Contract dated August 19, 1965, between 3M and Four Jays Music Inc. E1328

ASCAP Exhibit No. 204—Contract dated April 14, 1966, between 3M and Frank Music Corp. E1339

ASCAP Exhibit No. 205—Contract dated October 1, 1965, between 3M and Holloway Publishers, Inc. E1352

ASCAP Exhibit No. 206—Contract dated January 25, 1965, between 3M and Jewel Music Publishing Co. E1361

ASCAP Exhibit No. 207—Contract dated July 26, 1965, between 3M and Joy Music, Inc. E1371

ASCAP Exhibit No. 208—Contract dated October 1, 1965, between 3M and International Korwin Corp. E1379

ASCAP Exhibit No. 209—Contract dated March 1, 1965, between 3M and Leeds Music Corp. E1390

ASCAP Exhibit No. 210—Contract dated March 15, 1966, between 3M and Mills Music Inc. E1400

ASCAP Exhibit No. 211—Contract dated March 15, 1966, between 3M and Pic Corporation E1412

ASCAP Exhibit No. 212—Contract dated August 3, 1966, between 3M and Ray Music Co. E1423

ASCAP Exhibit No. 213—Contract dated September 1, 1965, between 3M and Ross-Jungnickel Music Inc. E1432

ASCAP Exhibit No. 214—Contract dated September 7, 1966, between 3M and St. Nicholas Music Inc. E1446

ASCAP Exhibit No. 215—Contract dated February 21, 1966, between 3M and Sam Fox Publishing Co. E1458

PAGE

ASCAP Exhibit No. 216—Contract dated September 1, 1965, between 3M and Southern Music Publishing Co. E1471

ASCAP Exhibit No. 217—Contract dated January 25, 1965, between 3M and Shapiro, Bernstein & Co., Inc. E1486

ASCAP Exhibit No. 219—Contract dated October 1, 1965, between 3M and Laurel Music Corp. E1496

ASCAP Exhibit No. 222—Contract dated April 2, 1965, between 3M and Hi-Ti Music Corp. E1507

ASCAP Exhibit No. 223—Contract dated November 5, 1965, between 3M and Milene Music, Inc. E1517

ASCAP Exhibit No. 290—Agreement dated as of 7/1/67 between CLGA and Producers E1529

ASCAP Exhibit No. 326—Gitter Affidavit dated 6/17/74 in this action E1563

BMI Exhibit No. 114—BMI Consent Decree dated December 29, 1966 ..... E1568

BMI Exhibit No. 166—Letter from Edward Cramer to CBS dated October 29, 1969 ..... E1579

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM,

Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

Defendants.

72 CIVIL 5740

BEFORE:

HON. MORRIS E. LASKER,

District Judge

New York, N. Y.
May 1, 1973 - 10 A.M.

APPEARANCES

CRAVATH SWAINE & MOORE, ESQS.,
Attorneys for Plaintiff
ALAN J. HRUSKA, ESQ.,
ROBERT S. RIFKIND, ESQ.,
ROBERT K. BAKER, ESQ.,
J. BARCLAY COLLINS, ESQ., and
ROBERT SONDAK, ESQ., Of Counsel

JOHN D. APPEL, ESQ.
and
RICHARD G. GREEN, ESQ.
Attorneys for Plaintiff

PAUL WEISS RIFKIND WHARTON & GARRISON, ESQS.,
Attorneys for Defendant ASCAP
JAY H. TOPKIS, ESQ.,
ALLAN BLUMSTEIN, ESQ.,
MAX GITTER, ESQ., and
MARK A. BELNICK, ESQ., of Counsel
and
HERMAN FINKELSTEIN, ESQ.,
BERNARD KORMAN, ESQ. and
RICHARD REIMER, ESQ.

HUGHES HUBBARD & REED, ESQS.,
Attorneys for Defendant BMI
AMALYA L. KEARSE, ESQ.,
GEORGE A. DAVIDSON, ESQ., and
RICHARD WILE, ESQ., of Counsel

SIMPSON THACHER & BARTLETT, ESQS.,
Attorneys for Defendants MCA and Duchess
ALBERT C. BICKFORD, ESQ. and
EDWARD MENDZ[illegible]KI, ESQ., of Counsel

LINDEN & DEUTSCH, ESQS.
Attorneys for Defendants G. Schirmer and
and Associated Music
DAVID BLASBAND, ESQ., of Counsel

MR. HRUSKA: Ready.

MR. TOPKIS: ASCAP and the other defendants we represent are ready, your Honor.

THE COURT: Very good.

MISS KRARSE: Defendant BMI and the other defendants we represent are ready.

MR. BICKFORD: Your Honor, may I just say a word? I represent MCA. My name is Albert Bickford of Simpson, Thacher & Bartlett. We represent MCA, which is sued only as a member of ASCAP, and Duchess Music, sued as a member of BMI. We have noted our appearance, but we do not expect to take any active part but will just keep in touch with the proceedings. If your Honor would excuse us from the court, we do not think it would be necessary to be here all the time.

THE COURT: I hope you won't be offended if I say I will be glad to do so.

MR. BICKFORD: Thank you, Judge.

THE COURT: Are there any other defendants who have representatives in the courtroom?

All right. I received lengthy and very interesting pre-trial memoranda from the three active parties to this case, which I have read with great care, and under the circumstances no opening statements are necessary. I am prepared

to hear testimony.

MR. TOPKIS: If your Honor please, before we go to that, may I be heard on a motion I should like to address to the Court, a motion to dismiss.

THE COURT: Yes.

MR. TOPKIS: The motion has become necessary, I should say preliminarily, since receiving CBS's trial brief because there, for the first time, I believe, we received an explicit statement of what it is that CBS is attempting to accomplish by this litigation.

We received notice that CBS is seeking one of two objectives. It would either ask this Court to compel us to issue what it has chosen to call a per use license for the television network or, in the alternative, it would ask the Court to enjoin ASCAP and BMI, and I will speak, if I may, of ASCAP alone, for convenience sake. Not only is Miss Kearse entirely competent to speak for BMI, but it is shorter.

The relief is that ASCAP be enjoined from licensing any television network, and this latter form of relief involves not only CBS and ASCAP but also ABC and NBC, the other two principal television networks, with which we today have existing blanket television licenses which will expire sometime late in 1976.

And so the second form of relief which CBS seeks here is aimed not only at ASCAP but also at CBS' two major competitors, and it would deny them the benefits of contracts which they solicited and obtained and presumably wanted.

CBS would also deprive those competitors of certain other rights that they would otherwise enjoy under the amended final judgment and under the parallel BMI decree, that is to say, the right to obtain licenses from ASCAP and BMI.

NBC and ABC presumably prize those rights, at least as to ASCAP; they have exercised them repeatedly over a quarter of a century. That is the right to go into court and demand a blanket or per-program license.

Now, CBS did not ask this injunctive relief in its original complaint here. This demand matured, and I quote the CBS brief, "in its full Draconian dimensions only in the CBS trial brief."

Now, we have known, of course, far longer, that CBS wants a per use license here. But I have said for some time now, with deadly earnest, that although I heard the words, "per use," I didn't know quite what the dimensions of the per use license were that CBS had in mind, and as we went through the years of this litigation CBS changed its

mind repeatedly about what "per use" meant.

Your Honor will doubtless recall from your study of the trial briefs here, particularly Miss Kearse's, of the vicissitudes which the per use license has experienced as CBS has changed and molded it. And so, your Honor, when we were in the course of drafting a pre-trial order for submission to you, in my drafting of the draft that Mr. Hruska and I worked on, I provided an explicit requirement that CBS state in its pretrial brief exacity what it wanted by way of a per use license.

My friend, Mr. Hruska, objected. He said that he didn't want to be obligated to do that, but he said that he would do that, that such was his intention; that is to say, he didn't want to do it as a matter of obligation but of grace and favor.

And I must say that my experience with him and his firm is long enough so that when he makes an undertaking like that, I bow. There is nothing in the pre-trial order compelling CBS to state the per use license it wants, and Mr. Hruska was, at least in broad dimensions, good to his word.

So, in the CBS trial memorandum we do have a statement of the broad outlines of a per use license as CBS wants it. The dimensions are not clear enough, I will

suggest to your Honor, for real use, but they are sufficiently clear for my present purpose, because the idea is there made explicit: That under a per use license CBS shall designate a portion of our repertory for coverage by the per use license, and to protect our members each member will have the right to withdraw from the repertory of that per use license any or all of his compositions. To quote the precise language of the CBS brief, it reads: "Each ASCAP member and BMI affiliate would have the right to cancel a ASCAP's or BMI's authorization to license CTN" -- that is Columbia Television Network, of course -- I understand the per use license with respect to some or all of its compositions." -- that is to say, an absolute right of withdrawal in each member of ASCAP.

Now, this right of withdrawal is not, of course, to be totally unconditional. We learned from the deposition --

THE COURT: Let me state that I am quite aware of the ~~initials~~ 15545 and that although I am interested to allow you the opportunity to put your position as to the legalities of the situation on the record by making a motion to dismiss, I would like to see if we can't do that as concisely as possible so that we can get to the testimony in this case. which is three and a half years old.

MR. HRUSKA: Your Honor, may I raise one point at

this state? The ground rules here, of course, as we all understood them, were that there would be no opening statements. I believe that Mr. Topkis' statement is turning into an opening statement.

MR. TOPKIS: It is not, your Honor.

THE COURT: There is always a risk of that when somebody feels strongly about matters and wants to make himself clear to the Judge. But I understand, and I would like to get to the legal aspects.

MR. TOPKIS: Well, I'm not sure you do, with respect, your Honor, because it doesn't appear in the CBS brief. But Dr. Stanton in his testimony said --

THE COURT: I understand it.

MR. TOPKIS: You are familiar with that. That is to say, he says it is indispensable, if you pull us to CBS, that you pull us to ABC and NBC also.

THE COURT: I will hear Dr. Stanton and I will read him, but I understand that that's what the defendants state in their brief.

MR. TOPKIS: Okay. So CBS wants again to affect the rights of ABC and NBC without their being present.

Now, that in itself, I think, would be enough to require dismissal of this action for failure of indispensable parties, but there is another problem here, and that is this:

We entered into the licenses that we entered into with ABC and NBC under the amended final judgment before Judge Ryan.

CBS was given notice of applications to approve those licenses before Judge Ryan.

CBS attended before Judge Ryan as to both, as to -- I'm sorry, as to ABC. I have no transcript of the NBC proceedings so I'm not sure as to NBC, but as to ABC there certainly was a hearing last October, and at that hearing CBS stated that it didn't acquiesce but it didn't object and that it would present any contentions that it had with reference to the discriminatory or otherwise defective qualities of the NBC and ABC licenses in a proceeding which it had pending before Judge Ryan on an application for a blanket license which it instituted simultaneously with the institution of this litigation.

So that we have CBS saying to Judge Ryan, "Go ahead," or, at least, "We are standing quiet."

Now, under those circumstances, it seems to me that CBS can't come to your Honor and say, "Undo what ABC and NBC entered into with ASCAP."

Their proper remedy is to go back to Judge Ryan and seek there to undo what they acquiesced in, if that be an appropriate course.

But how in the name of heaven they can, having set quiet -- and it was more than just the entry of the licenses. As to NBC, your Honor will perhaps recall --

THE COURT: Again, Mr. Topkis, let me suggest this. The points that you are raising may develop, of course, into significant points. They are points which are bound to occur to anybody who reads the briefs and knows the positions taken by the parties.

I don't think that it is appropriate to make an extended statement on it at the moment. If you want to develop these points in the course of the litigation by submitting a memorandum with regard to these particular points, I will be very glad to receive it.

I understand the issues that you raise and I don't deprecate them by saying that I will obviously not grant the motion at the present time, but I will reserve decision.

I will be glad to hear Mr. Hruska if he wants to reply at this time, or if he wants to reply in writing, I will be glad to accept his answer in that fashion.

MR. TOPKIS: I would add just this final comment, if I may, your Honor.

This is not a matter of the relief phase of the litigation. Per use and what it means ~~is the decor~~ AT THE DECK of this

case.

THE COURT: I understand.

MR. TOPKIS: I have nothing further to say.

MR. HRUSKA: I would like to make just a brief response, Judge.

THE COURT: Do you want to add something, Miss Kearse?

MISS KEARSE: I would just like to state that on behalf of BMI I join in Mr. Topkis' motion. We, too, have existing blanket contracts with the other television networks.

MR. HRUSKA: First of all, your Honor, I would point out that the basic concept of the per use license has been delineated in this case repeatedly, I think, beginning at a very early stage.

We have constantly faced a position by the defendants that we haven't told them what a per use license means.

I think the concept is so simple, and I think the rest is mechanics, and I don't think that the liability phase of this case depends upon showing all the nuts and bolts, every single little detail. I think all that has to come to light here is that this is a sensible, workable system, and I think your Honor will see that. That's all

I want to say on that.

THE COURT: The term of art that we have been using, because it is used in other analagous situations, is "feasible," right?

MR. HRUSKA: Yes. We have been using that word, right.

Just to comment on Mr. Topkis' statement concerning the pre-trial order, I didn't want to put in the pre-trial order that plaintiff would be under an obligation to state all the details of a per use license because I didn't want to feed this myth which has developed in this case that we never told them what a per use license means. ASCAP knows what a per use license means. They have always known what it means.

I think ASCAP regards this as the Achille's heel to their organization. I think the evidence in this case will show that in 1961 we asked ASCAP for a per use license something I didn't learn until this case was on-going.

Now, on the question of the injunctive relief, this is another myth which ASCAP has propogated. "You never told us about this." Every time this alternative form of relief arises in this case, ASCAP responds by saying, "You never told us about this."

Well, we told them in the summary judgment motion.

Certainly it is on the transcript of that argument, and it has been in virtually every brief that's been written in this case since that time.

THE COURT: Of course, what will be much more important is not what or whether you told ASCAP but, at least as of now, there is no longer surprise, but ultimately we will have to justify, assuming that I agree with your argument, what the Court's power is with regard to NBC and ABC.

MR. HRUSKA: Of course. And I don't think that's an easy question, your Honor. I think there is authority for it. I think it makes sense, but this is a subject which I think your Honor will have to receive substantial briefs on. There are certainly analagous areas where relief is entered, for example, in a Section 7 case dissolving an acquisition. Usually that has wide-stepping effects on third parties, on people who are not parties to the transaction itself. And the Courts have considered that.

There is a recent decision, for example, in which the Court deals with the question of whether or not divestiture in a Section 7 case is available in private litigations as opposed to Governmental litigations. The Court concludes that it is, and discusses this whole

question of effects on third parties.

Also, I would like to say that the point of view that the other television networks are necessarily content with the ASCAP blanket licensing systems, I think, ~~from~~ is a fallacy of rather major proportions.

THE COURT: Frankly, in that regard, I don't see how I can accept the statements of either you or Mr. Topkis. If it becomes relevant I would obviously have to hear witnesses from those companies.

MR. HRUSKA: I think that is so, and I would simply point to the agreements that NBC and ABC have made with ASCAP and BMI which give NBC and ABC the right to obtain a per use license if CBS obtains one in this lawsuit.

THE COURT: All right. Let me just say as a principle that since we have all agreed that the time we have available to put in the evidence that you gentlemen want to put in is limited.

I hope that with regard to legal questions in the future we will deal with them without charging it against witness time. Let's put it that way.

I am ready to hear the first witness.

MR. HRUSKA: I would like to call to the stand, your Honor, Donald Sipes.

DONALD SIPES, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HRUSKA:

Q Mr. Sipes, what is your position?

A I am vice-president, business affairs and planning, for the CBS Television Network.

Q Could you tell us so that we have something on the record, what is the CBS Television Network?

A The CBS Television Network is a division of Columbia Broadcasting System.

Q Could you give us, just very broadly, the business in which the CBS Television Network is engaged?

A The business we are engaged in is we obtain the rights to transmit programs to stations that agree to accept them, and in conjunction therewith we sell to advertisers commercial time.

Q What are your responsibilities as vice-president of business affairs and planning for the CBS Television Network?

Incidentally, can we refer to that as CTN?

A My responsibilities are the following:

I oversee both the east and west coast business

affairs departments which obtain the rights to programs and to creative elements of programs.

I also oversee the music operations department.

I am also in charge of Studio Center, which is our film plant in California.

I am also in charge of TV City which is our tape facility and office space.

Q What was your educational background?

A I graduated from Ohio University with a BA in 1948.

I graduated from Harvard Law School in 1951.

Q Are you admitted to the bar, by the way?

A Yes, I am a member of the bar.

I was in the Army from 1951 to 1953.

After that, from 1954 to 1957 I worked in several law firms in New York.

Q After that?

A In 1957 I went to work for National Broadcasting Company as an attorney in their law department.

THE COURT: Is that pretty good training for work at CBS?

THE WITNESS: Yes.

A (Continuing) And from there I went into the department at NBC that is equivalent to the business affairs

department.

Q In other words, the CTN business affairs department, you mean?

A Yes, I'm sorry. And I stayed with them until 1961.

Q And then?

A From 1961 to 1963 I worked for the Frank Cooper Associates Agency, which is a talent agency.

In 1963 I went to work for CBS, CTN.

Q What was your position at Frank Cooper?

A I was director of negotiations; basically, a business affairs man.

Q Can you give us an idea of what you did in that job?

A In that job I negotiated deals or bookings, as they are known, ~~with~~ For performers or writers, or other creative elements, with packagers, and with networks or studios, and I also negotiated deals for packagers with networks or studios.

Q In other words, the mirror image of what you do now ?

A That's correct.

Q Could you trace the positions that you have held at CBS since the time you joined them, which I think you

said was 1963?

A That's correct, 1963.

In 1963 I become director of ~~packaging~~ PACKAGE negotiations for CTN business affairs department and I held that post until 1965.

What did you do in that job? Perhaps you can tell us.

A I negotiated deals for programs for CTN.

In 1965 I was promoted to vice-president, business affairs, Hollywood. I was in that job until 1968.

In 1968 I became vice-president, business affairs and moved back to New York, and then in 1970 the words, "and planning" were added to my title.

Q What were your responsibilities as vice-president of business affairs, Hollywood?

A Well, as vice-president, business affairs, Hollywood, I ran the department in California that made the deals to obtain programs and elements in Hollywood.

Q And when you came to New York --

A I reported to the vice president, business affairs, who was headquartered in New York at that time.

Q And then when you came to New York as vice-president, business affairs, that man reported to you?

A That's correct.

Q Is there any real difference between what you did as vice-president, business affairs and vice-president, business affairs and planning?

A Basically only that the facilities operation and other assignments were added to my job, but basically the business affairs operation is the same.

Q Who produces the programs which are transmitted by CTN?

A CTN produces a nighttime series called "Gunsmoke," and also two daytime serials. In other words, known as soap operas.

CTN also produces an occasional made-for-TV movie and an occasional special, usually of the musical variety type.

CBS news division produces the news programs that are transmitted by CTN. Otherwise, all programs are produced by packagers.

Q Who are these packagers?

A Packagers would fall into what I would call two broad categories. The first category is known as the studios, and that would be such as Paramount TV, Universal TV, Warner Brothers, MGM, 20th-Century Fox.

THE COURT: Basically the old movie companies?

THE WITNESS: Right.

A (Continuing) And the other category is what we call independents and they range from Lorimar Productions, which produces "The Waltons," for instance; the Mary Tyler Moore Company which produces "The Mary Tyler Moore Show" and the "Bob Newhart Show."

Cave Creek Enterprises which produces "The Dick Van Dyke Show." Also, Carol Burnett's company which produces her show and Sonny and Cher Company which produces their show, and the like.

Q What, in general, is the nature of the financial transactions between CTN on the one hand and the packagers on the other hand?

A The nature of the financial transaction is that we together negotiate what is known as a package price. In other words, a flat sum for the first run of the program on the network, and another sum for each network rerun thereafter.

Q That is a negotiated price?

A That's a negotiated price.

Q For each run?

A For each run.

Q Now, during the period of time in which you have been involved in such program negotiations, have there been any changes in the nature of the negotiations?

MR. TOPKIS: If your Honor please, that seems so broad a question.

THE COURT: It is but I assume we are going to narrow it down quickly.

MR. HRUSKA: Yes. I am trying not to be leading.

A Well, may I go on?

THE COURT: Perhaps you might say what have been the significant changes.

MR. HRUSKA: Fine.

Q What have been the significant changes in the nature of the negotiations between the network on the one hand or CTN on the one hand and packagers on the other hand?

A In my time, ten or fifteen years ago, there was a much more detailed negotiation between the packager and the networks. In other words, you really went into a man's budget in detail, discussed with him his costuming problems, his script problems, all of the elements that went into building the show were discussed in detail to arrive at a negotiated price. We were all feeling our way there.

As time has gone by, of course, we have learned shorthand with each other and we can rather quickly arrive at a negotiated price subject, of course, to like how many

star leads would you have, or is the show on location a lot, something like that would influence you and you would go into that in a bit of detail, but otherwise there is much more shorthand.

BY THE COURT:

Q I am not sure what the importance of all this is, but I assume I will find out as time goes by, but I am not sure that you are saying that different elements are considered or not considered, or just that you are all a lot more expert at it and it doesn't take as long.

A Your Honor, that's what I mean.

Q The latter?

A Right. We have learned a lot and we can deal with each other much more quickly.

BY MR. HRUSKA:

Q Do you also know basically what certain primary basic program components are to come in for?

A That's what I mean. We have learned all these things. Of course, you know basically what a half-hour script for a situation comedy is going to cost you within a bit of a range.

Q Do you know what going on location is going to cost?

A You can make a pretty good stab at it depending

on where the man is going and what kind of show he is producing. But you have got to know something more there.

Q Is that based on experience with other programs and what component costs would come in for?

A Yes.

Q What program elements do packagers supply as part of the program package?

A They supply all elements of the package except one, namely, music performance rights.

Q So that they supply synchronization rights for music?

A That's right.

Q Do you know whether ASCAP or BMI handles synchronization rights for music?

A It is my understanding that they don't.

Q Do you know how they are licensed, synchronization rights?

A Again it is my understanding that they are licensed through, for instance, the Harry Fox Agency or a similar agency to that.

MR. TOPKIS: On the voir dire, could I inquire whether the witness has any personal experience with this? Otherwise, I think we will have more expert people to testify on the subject.

THE COURT: I gather from what he said that he hasn't had much experience in this subject.

THE WITNESS: That's right.

MR. HRUSKA: We will have other expert people.

MR. TOPKIS: Fine. Thank you.

BY THE COURT:

Q Could you explain to me -- this much I am sure you have had personal experience with -- what you mean by synchronization rights and how music is synchronized on TV as opposed to performance?

A I think you will need a better expert than I am in that area, but you need ~~theright~~ THE RIGHT to record the music with the program in synchronization with the program.

If you need more than that, I'm not an expert on the technical area.

Q No. I just wanted your definition of it. Thank you.

MR. HRUSKA: I think, if I may comment for a moment, your Honor, that the nature or the legal right involved, the synchronization is a subject of some considerable confusion but we will get into that later.

THE COURT: I am glad to know that this is NOT going to be a simple case.

MR. HRUSKA: There may be one or two decisions

on what a synchronization right is. It is not covered by the copyright law but it is obtained in practice and everybody gets a synchronization right, the right to record the sound track.

BY MR. HRUSKA:

Q How are music performance rights licensed for CTN programs?

A CTN has a blanket license arrangement with ASCAP and BMI.

Q Could you describe the basic features of a blanket license arrangement?

MR. TOPKIS: I think, with all respect for the witness, your Honor, these are matters of documentary proof rather than shorthand. If shorthand is desired, we all know what the blanket license price is, but I don't think we will gain anything from Mr. Sipes.

THE COURT: I will see what we gain, if anything

A Well, broadly speaking, a blanket license is the following:

The network --

MR. TOPKIS: I am having trouble hearing the witness.

THE COURT: Will you speak a little louder?

MR. HRUSKA: Don't look at him.

A (Continuing) CTN pays a fixed fee or a fixed percentage of its revenues to the performing rights society on a yearly basis.

The license covers the entire pool of the society's music.

There is no reduction of that blanket license for any direct licensing of music, and that blanket license, the amount of money doesn't vary with the use of music on the network. Basically that's my understanding of blanket license.

Q How does that system of licensing performance rights for music compare with the way in which other program elements are obtained?

MR. TOPKIS: I object to that question as a matter of form.

THE COURT: Why don't you take them one by one?

MR. HRUSKA: We just discussed Mr. Sipe's understanding of the basic features of the blanket license system.

THE COURT: Why don't you take the other factors one by one? He will have to do it anyway. Ask him them one by one.

Q How are other program elements obtained?

A Well, other elements of programs are obtained by

producers of programs or packagers of programs as they are needed for the particular program in an open competitive market place.

Q Are those costs that packagers incur passed along to you?

A Yes. Those costs, of course, would be built into the package price that I pay.

THE COURT: But you are not suggesting that what you end up with is a cost-plus price ~~in which~~ but RATHER you assume by virtue of your experience in negotiation that the packager includes his costs?

THE WITNESS: Right, your Honor. It's not a cost-plus arrangement but we all know, as I discussed before, basically what everything is costing, and we can arrive at the prices based upon those factors and what the man is doing for a living.

Q Do you see any advantages to a system in which program packagers obtain program elements on a needed basis in a competitive market?

MR. TOPKIS: I object.

Q In comparison to a system in which a television network obtains elements on a blanket basis?

MR. TOPKIS: I persist in my objection on the ground of form. The witness is not qualified as ~~a chemist~~ AN ECONOMIST

nor a political scientist. All we are going to get in response to that question is what we have already seen in various briefs. I don't think it will really help the Court.

THE COURT: Well, it is important, Mr. Topkis, to realize that either by stipulation or testimony we have to make a record for the Court of Appeals if not for me, and that what is in the briefs isn't going to take care of that.

Now, the question of competency and form are other matters. I would say, Mr. Hruska, that I think the question itself is extremely confusing. Although Mr. Sipes may understand what it means, I can't say that I do.

I am going to be broad here both with CBS witnesses and your witnesses in allowing them to express opinions bearing in mind that I am giving each of you the right to comment on the limitations of, or the expertise of these witnesses, and I really don't think that this case in the long run is going to be solved by being narrow in the approach to testimony and for that reason I overrule the objection with regard to expertise and competence but I would ask you to rephrase it or break it up into parts, or something of that sort, so we all know what we are dealing with.

MR. HRUSKA: All right, your Honor.

Q Mr. Sipes, you have given a general picture of the way in which other program elements are purchased by program packagers, et cetera. You have given a general picture of the way the CBS Television Network now purchases or licenses music performance rights.

I want to know basically whether you see any advantages in one system over the other?

MISS KEARSE: I object, your Honor. That sounds like exactly the same question to me. In addition I would like to have a little voir dire of the witness.

THE COURT: In what regard?

MISS KEARSE: With regard to the witness' expertise with respect to obtaining music rights. We have heard about the witness' background in other areas but I would like to ask the witness whether he had any experience in obtaining music rights prior to 1968.

THE COURT: All right.

THE WITNESS: Are you talking about music performance rights?

MISS KEARSE: Yes.

THE WITNESS: No, we had a blanket license, your Honor, and it was in existence. I was not, I had no part in that negotiation for that blanket license but, of

course, there is no direct licenses at all for any music performance rights when you are under a blanket license.

THE COURT: I understand the answer to the question, Miss Kearse.

I adhere to my ruling that I will accept the views of these witnesses so long as they have had what I consider in Mr. Sipes' case to be substantial experience in this field even though there are other types of expertise that may be important, and fully recognizing that he is a CBS officer, who has got to be considered as an interested party.

MR. HRUSKA: And I may point out, your Honor, Mr. Sipes obviously is not an economist, and I am not asking him for his economic expertise. I just want to find out or have placed on this record how it strikes him as a business man, the advantages and disadvantages of these two systems.

THE COURT: Do you understand the question?

MISS KEARSE: Your Honor, I would make a continuing objection to these questions.

THE COURT: Well, the continuing objection will be noted, and it is my custom to assume that if an objection is made of this character it does continue.

THE WITNESS: If I may, I would appreciate hearing

it once more.

MR. HRUSKA: Sure. Okay.

THE COURT: Do you want it read back?

MR. HRUSKA: No, no. I will repeat it.

BY MR. HRUSKA:

Q You have told us, at least in basic outline, how program packagers obtain elements for programs, and you ~~hafe~~ HAVE given us the basic outlines of the arrangement under which CBS Television Network obtains performance rights to music.

I would like to know whether you see any advantages to one system or the other?

THE COURT: Advantage to whom? I think that ought to be made clear.

MR. HRUSKA: All right.

Q (Continuing) To the CBS Television Network and/or program packagers.

MR. TOPKIS: Now could I have that read back?

THE COURT: No. Let's go ahead.

A Well, I see, of course, an advantage as far as the television network ~~whether~~ WHENEVER it is a PRODUCER procedure, and to any packager who is a producer of his shows, ~~and~~ IN the system whereby you buy elements as you need them for your particular show. After all, any producer or packager is

the man who has the day-to-day living to do with the programs he is producing, he can weigh it in the balance, all the creative elements that go into making the show, whether it is the performers, the script, the dancers, the music, whatever it may be, and also he is always making what we call in the business trade offers among his creative elements to make the best creative balance of his shows.

He's got money, he's got a certain amount of elements to buy, he balances these elements for every show, he may trade off, say, a performer on Show No. 1 who wants more money than he really wants to pay for the guy, but he really wants that performer. He may very well say, "Okay, I will go with that. I am paying for it but I want that guy. This is the guy I want. This is the guy I need for the show." "But Show 4 that I will be producing later on, I think I will cut back. I had fourteen dancers built into that one. I think I will cut back to eight dancers." He would trade off these things. In fact, producers of packages do this all the time. That's why I say I think that's, to me, under those circumstances, a much more preferable approach.

Q Prior to commencing this lawsuit, did you ever meet with anybody at ASCAP?

A Yes, I met with Mr. Harry Finkelstein.

Q Do you remember when that was?

A Well, my recollection is that that was sometime late in 1968 or early 1969.

Q Did Mr. Finkelstein propose anything to you?

MR. TOPKIS: Your Honor, couldn't we have this in the customary fashion by what was said by whom?

THE COURT: I assume that's what we will get.

BY THE COURT:

Q Can you tell us, first of all, about where this meeting occurred and what the circumstances of the meeting were?

A Well, as far as my recollection goes, your Honor, that meeting was at the ASCAP offices.

Q What was the purpose of it?

A The purpose of it was to hear about a proposed blanket license arrangement from ASCAP.

Q To hear about that, I assume that somebody must have advised you that that subject would be discussed, whether it be somebody at ASCAP or CBS?

A As far as I can recollect, your Honor, my attorneys in the company, the corporate attorneys, told me that this meeting had been set up and that we were going over to ASCAP to discuss that matter.

Q And were others there besides Mr. Finkelstein

and yourself?

A Well, there were other members of ASCAP whose names I cannot recall, sir, and there was, as far as I recollect, now, of course, Mr. Evans and Mr. Appel, and the CBS attorneys.

Q And what did Mr. Finkelstein say and what did you say?

MR. TOPKIS: May we know the date of that, your Honor?

MR. HRUSKA: Sometime in late '68 or early '69.

MR. TOPKIS: I see.

Q As well as you can recall, will you tell us what you said and what Mr. Finkelstein said?

A Mr. Finkelstein said that -- he proposed that we enter into a new blanket license arrangement with ASCAP starting January 1, 1970 and that CTN should pay for the year 1970 $6 million for the blanket license.

Q When you say "new," do you just mean a renewal?

A There was a blanket license in effect, your Honor, which was running out, as I recollect, as of the end of 1969.

Q You are not suggesting that he suggested anything new in its form.

A No, not new in form, no. It was a new deal because an old one was expiring.

A All right.

A He proposed $6 million for the year 1970 and that for each year of the deal thereafter there would be an escalating fee. In other words, year two would be higher

than that, and year three would be higher than year two, et cetera.

BY MR. HRUSKA:

Q Did you make any counter proposal?

A I made no counter proposal.

MR. TOPKIS: Could we have the balance of the conversation?

THE COURT: On cross examination.

MR. HRUSKA: Exactly. I am conducting this examination. In my opinion, the important part has been brought out.

THE COURT: All right, Mr. Hruska. I agree with you. Let's go on.

BY MR. HRUSKA:

Q Prior to commencing this lawsuit, did you meet with anybody at BMI?

A Yes. I met with Mr. Cramer of BMI, and as far as I can recall that took place during 1969.

Q And do you remember whether it was one meeting or two meetings?

A Several meetings.

Q Several. And what of importance to you happened at those meetings? Let me just put it that way.

THE COURT: I didn't hear the question.

Q What of importance to you happened at those meetings?

MISS KEARSE: Objection.

THE COURT: I will sustain the objection. Let's hear what happened. What was said, actually, is what we are concerned with.

Again, Mr. Hruska and Mr. Sypes, you've got to realize that for your opponents and for me you have to be as precise as possible about this now. I would like to know when the meetings occurred, where they occurred, who was there and who said what.

THE WITNESS: Well, your Honor, there were several meetings. I know they took place during -- off and on during 1969. It is rather hard for me honestly to pinpoint exactly the dates when those meetings took place. Most of them took place at BMI. One or two may have taken place at the CBS building.

BY THE COURT:

Q Were all the meetings that you are speaking of related to a specific subject?

A Yes, sir.

Q And what was the subject?

A The subject was a new blanket license arrangement with BMI.

Q And Mr. ~~Kramer~~ CRAMER spoke for BMI, did he, and you spoke for CBS?

A Right.

Q All right. Then would you tell us the substance of what you recall Mr. ~~Kramer~~ CRAMER said in the course of those meetings and your having said to him?

A What Mr. ~~Kramer~~ CRAMER said to me in those meetings was that he wanted CTN to enter into a new blanket license with BMI and that he wanted parity with ASCAP in that deal.

Q Did he describe what he meant by parity?

A Well, sir, we had conversations. The impression left with me was that he wanted the same money, that whatever deal I would make with ASCAP, he would want the same money for BMI.

Q You mean he wanted the same blanket fee: If it was $6 million with ASCAP, he wanted $6 million with BMI?

A Yes, sir.

BY MR. HRUSKA:

Q Did you accept that proposal?

A No, I did not accept that proposal.

Q Did you make a counter proposal?

A Well, again, it is my recollection that in one of those meetings with Mr. ~~Kramer~~ CRAMER I asked Mr. Kramer for a per use license.

Q And what was Mr. ~~Kramer~~ CRAMER's response to that?

A Mr. ~~Kramer's~~ CRAMER response to that was that he would not give me a per use license unless ASCAP gave me one first.

Q ~~Had~~ HAVE you ever asked ASCAP or BMI on any other occasion for a per use license for CTN?

A Well, by Mr. Wood's letters of December 19, 1969, CTN requested a per use arrangement from both societies. Mr. Wood is president of CTN.

MR. HRUSKA: Your Honor, I think this is probably as good a time as any to offer in evidence that letter. We've already marked the letter as PX 200. I would just ask the witness whether this is the letter to which he just referred in his testimony (handing).

THE WITNESS: Yes, this is the letter.

THE COURT: Any objection to the letter?

MR. TOPKIS: No objection, your Honor.

THE COURT: All right. Received in evidence.

(Exhibit PX 200 was received in evidence.)

THE COURT: I will state for the record that plaintiff's exhibits will be designated PX, ASCAP's will be AX, and BMI's will be BX.

Is that correct?

MR. TOPKIS: Yes, your Honor.

MR. COLLINS: There is also a series for plaintiff

which will be marked 3MPX.

MISS KEARSE: I will move to strike that portion of Mr. Sypes' testimony which states that prior to December 19, 1969 he requested of BMI a per use license, on the ground that an answer to an interrogatory served by CBS, dated April 14, 1970, states in fact that the first such request was made on December 19, 1969. There has been no amendment to that answer. That interrogatory has been filed with the Court as a matter of record.

THE COURT: All right. I'll consider that application.

MR. HRUSKA: May I just say on that, your Honor, that Mr. Sypes testified to this point in a deposition taken some months ago, and that point has been on the record at least for those months.

MISS KEARSE: Your Honor, that strikes me as irrelevant, that Mr. Sypes has said it before. In answer to the interrogatory, which was served very close to the commencement of this suit, there was no mention made of this. As time passes, people's memories change.

THE COURT: Well, let me suggest this. When we have such motions as we bring up, will you please make the motion for the record, and then at the end of each day or the beginning of each day or the middle of each day let's

take time in the robing room to review what I'll call these more technical questions to see what merit there is to them. I am making a note, of course, that it is on the record.

BY MR. HRUSKA:

Q Can you tell us, prior to Mr. Wood's letter of December 19, 1969, did you have any discussion with Mr. Wood on the subject of making a per use request of ASCAP and BMI?

A Yes, I did.

Q Did you make any recommendation to him?

A Yes. I made a recommendation --

MR. TOPKIS: Before we go any further, I will interpose a hearsay objection.

THE COURT: What Mr. Sypes proposed wouldn't be hearsay. But what difference does it make what he proposed?

MR. HRUSKA: I agree.

Q Mr. Wood's letter was sent. Now, were there responses received by CBS from ASCAP and BMI?

A Yes.

MR. HRUSKA: Your Honor, these have been marked. The ASCAP letter of December 23, 1969 is PX 201.

THE COURT: Right.

MR. HRUSKA: And the BMI letter of December 23,

1969 is PX 202.

Q Could you look at those, Mr. Sypes (handing)?

MR. TOPKIS: Just to hurry things along, there isn't any doubt about these letters.

THE WITNESS: I agree. These are the letters.

MR. HRUSKA: I agree. I offer them in evidence.

THE COURT: They are received without objection.

(Exhibits PX 201 and 202 were received in evidence.)

xxx MR. HRUSKA: I think the record is clear that CBS is seeking in this lawsuit per use licenses from ASCAP to BMI.

Q What do you see, Mr. Sypes, as the basic features of a per use license?

MR. TOPKIS: I object, your Honor. It seems to me that that is a statement that should come from counsel, as to what it is that CBS is seeking.

THE COURT: I believe so, too, Mr. Hruska. I think with regard to feasibility or any of the evidentiary questions involved you can ask whatever questions you want about a proposed license; but I think it isn't that it is counsel's obligation, it is the plaintiff's obligation, not an individual within the plaintiff's organization, to specify to the Court and to plaintiff's opponents what the per use

license it proposed is.

You can ask him as a witness what CBS is proposing, I will be glad to hear that, but I don't want his personal view of the matter.

MR. HRUSKA: I guess I am inclined to agree with that point of view, too. This is basically counsel's function, to propose the nature of the relief that is sought, the nature of the license. And, of course, what I am primarily interested in examining Mr. Sypes about is his ~~us~~ view as the vice president of business affairs of the CBS television network as to how this thing will work.

THE COURT: That is a different matter. I don't think that is the question you asked.

MR. HRUSKA: It is. I just thought it would be useful to get down --

THE COURT: I am very anxious to know how it would work and I am sure Mr. Topkis and Miss Kearse are, too. But I don't think that is the question you asked. I think you have to posit for the record --

MR. HRUSKA: I agree. I did not ask that question. I can posit for the record what I see are the basic features of the per use license.

THE COURT: I don't think it is any longer a question of what you see. I am not holding CBS to providing

every detail that may arise during the course of some litigation as complicated as this, but I think that you have to posit a certain hypothetical system and you are free to ask the witness, if such a system were approved by the Court, how he envisages that it would operate.

MR. HRUSKA: Okay. Could I, then, state the elements and then ask Mr. Sypes questions regarding those elements and how it would ~~owrk~~?

THE COURT: Yes.

MR. HRUSKA: All right. First there would be a fee and --

THE COURT: If you wish to read from your brief on this subject, you may. I think we should be as specific as possible as to what we are talking about so Mr. Sypes understands and we all do.

MR. HRUSKA: I don't have to read from the brief. I can state it, I believe.

THE COURT: In any form you want. I mean, it ought to be a tightly stated question.

MR. HRUSKA: I will state it as briefly as I possibly can.

Number one, CTN would pay ASCAP and BMI a specific fee for each use of ASCAP and BMI music covered by the license. That fee would vary depending upon the nature of

the use - for example, whether it is a feature theme or background use. In other words, there would be a schedule of fees for various types of uses. That schedule of fees would be set by the Court if it cannot be arrived at in negotiations between CBS on the one hand and ASCAP and BMI on the other hand, and it could be adjusted, or would be adjusted, at stipulated intervals in accordance with evidence of prices arrived at in the market place.

No use fee would be payable by CTN to ASCAP or BMI in the event that CTN or program packagers licensed the use directly. Each license could cover a portion of the ASCAP and BMI pulls which had been designated by CBS, or it could cover the entire pulls, and that would be dependent upon whether or not the administrative fee would be less, in the event that the license covered only part of the pulls.

If the administrative fee were to be the same price whether the license covered the entire pull or part of the pull, then there would be no particular reason for limiting the pull. In other words, it will be our position on this point, your Honor, at the relief stage of the case, that there ought to be a relationship between the administrative fee and the corpus of the license, the scope of the license. But that is a detail for relief. That is not, it seems to me --

THE COURT: Let me see what Mr. Topkis has to say.

MR. HRUSKA: I am not finished.

THE COURT: I understand. But I would like to hear what he is going to say.

MR. TOPKIS: I think, if we are going to be discussing the feasibility and other aspects of this proposal, we have to know finally what we are talking about. To be told that we'll make up our minds later and adjust the fee in accordance with it, it seems to me, puts us off in a total Never-Never Land right on the first point.

THE COURT: You can be assured that no plaintiff will ever secure relief from me unless he specifically indicates to my satisfaction what it is he wants, and you will have plenty of time to point out the weaknesses in CBS' position on this point.

But I don't think that that necessarily means that every element of this plan has to be specified as an element of a hypothetical question to be put to Mr. Sypes. I would like to see if we can frame a hypothetical question that will produce some useful testimony on Mr. Sypes' part -- by useful I don't mean that I will necessarily agree with it, but it will contribute to the discussion and it will stand as a basis for cross examination.

MR. HRUSKA: Right. I have only one point left to make on that.

MR. TOPKIS: Let me just add one final thought on that particular point, if I may.

If your Honor is content with that formulation, I, of course, am. But could I ask now permanently, throughout the trial, that the use of the invidious term "~~pull~~" be dropped? I will use no invidious terms to describe CBS, like "tarantula."

THE COURT: I hadn't understood it to be used in any invidious way. What do you want to call it? Inventory?

MR. TOPKIS: Repertory is the customary term to be used in the industry.

MR. HRUSKA: It is a common English word used by the Supreme Court.

THE COURT: If ASCAP prefers "repertory," it will save us time and avoid argument.

MR. HRUSKA: I will try.

THE COURT: Let's recapitulate. As I understand it, you are asking Mr. ~~Sypes~~ to assume that this Court might approve a system of licensing fees which would provide that CBS would pay ASCAP or BMI, as the case may be, a fee for each use and only each use. The fee would vary in accord-

ance with the nature of the music.

MR. HRUSKA: The nature of the use, your Honor.

THE COURT: Of the use. It would hopefully be negotiated, but if not it would be set by the Court. Fees would be adjusted at stipulated intervals in accordance with the prices or values set in the market place. There would be no fee to ASCAP or BMI for any particular piece ~~of~~ UNDER a direct license if that piece were secured from the composer or publisher, and you were then going on to talk about that the ranges of the license from ASCAP or BMI might vary from a segment -- this I must say does surprise me -- to the full inventory, because I had assumed that the full inventory would be the equivalent of a blanket license.

MR. HRUSKA: It all depends on how you define the word "blanket". That is, if you define it in the terms of the coverage of the license, what songs are covered by the license, then that would be true. But if you define it in terms of how payment is made, it would not be true.

THE COURT: I understand.

MR. HRUSKA: The only reason I made this point, your Honor, I was going to bring this out through Mr. Sypes, is because it has been, I think, another one of these red herrings in the case.

Our legal position on this is that there ought to be a relationship between moneys paid by the licensee to the licensor, depending upon coverage.

THE COURT: I am frustrated this morning by the fact that after three and a half years of waiting to hear witnesses in this case most of the time has been spent by counsel either making motions or other non-questioning.

There will be every opportunity that you gentlemen want, without the array of people that we have here and either on papers or orally, to give me your positions after we get a record. I would like to develop a record.

At the moment we are trying to create a hypothetical question for the witness, who is bound to be confused if we don't complete it very soon.

I have listed here six elements which --

MR. HRUSKA: Let me get to that.

THE COURT: Any element that is to be included.

BY MR. HRUSKA:

Q Each copyright proprietor would have the right to cancel ASCAP's and BMI's authorization to license his or its music under the per use license. In other words, they would have the right to pull their music out of that license and they can pull any one or more of their songs, and they could also pull for particular uses. In other

words, the copyright proprietor might pull that song from the license for feature performances and not for background or theme performances.

That is about as detailed as I can get right now.

THE COURT: Do you understand the hypothetical system that Mr. Hruska is asking you to assume at the moment?

THE WITNESS: I think so, your Honor.

THE COURT: All right. Based on that hypothetical state of affairs, what is the question?

MR. HRUSKA: There will be a lot of questions on this hypothetical.

THE COURT: Then let's state for the record that during the course of the ensuing questions we are asking the witness to assume that such a hypothetical state of facts would exist.

BY MR. HRUSKA:

Q Let us assume for the moment also, Mr. ~~Sypes~~, that the license applies only to a designated portion of the ASCAP-BMI ~~pull~~ pool, not the entire repertories. How would CTN designate the music to be included in the per use license?

MR. TOPKIS: On the voir dire, your Honor. This witness has testified in his deposition that he wouldn't know and that somebody else would.

THE COURT: I don't see why these things have to come up on the voir dire. They can come up on cross examination.

MR. TOPKIS: All right.

A I think that the music clearance department of CTN could take the performed works index of each society ---

THE COURT: Are these documents that are in existence or can you tell me what a performed works index is?

THE WITNESS: Yes, sir. They are in existence, and they are the compositions that have been played over a period of time.

THE COURT: They are lists?

THE WITNESS: Absolutely, lists.

I am sorry. I lost track of where I was. It would take the performed works index and perhaps, with the help of some outside music consultants, go over the performed works index and slim those down to get that body of compositions that would be in the reservoir.

Also I would think that some provision would be made for the introduction of new music into the reservoir as it appeared in the performed works index.

Q Have you ever heard the expression "music in the can"?

A Yes, I have.

Q Could you tell us what it means?

A Music in the can is music that has been recorded on CTN's programs, whether tape or film, and on the motion pictures -- theatrical motion pictures that we have bought for television play that are in our inventory.

Q Do you believe that the cancellation right which we have specified as being part of the per use licensing system ~~s-ould~~ should apply to music in the can?

A No, I do not.

Q Could you tell us why?

MISS KEARSE: Couldn't we have it without the leading questions, please?

THE COURT: All right. I think that the question is objectionable for a different reason, that is, that I am not interested in Mr. ~~Sypes~~ Sypes' opinion as to whether the license should or should not apply to what's in the can but whether you are asking that it does apply.

MR. BRUSKA: Your Honor, Mr. Sypes has told us that it should not apply. At least that was what I was expecting him to tell us. And I think your Honor will be interested in the reasoning with respect to it because I think it is a business matter.

THE COURT: I think we ought to get it straight

in the beginning. I am willing to hear evidence on why CBS is asking for what it is asking for, and of course we are all bound, you are bound, to produce and we are bound to listen to, evidence on whether it is feasible or not.

What I am trying to get away from is the aura in which an individual officer of CBS says what he thinks is good or is bad. I understand that CBS is taking the position that it is not asking for a per use license with regard to music in the can.

Is that right?

MR. HRUSKA: No, your Honor, it is not right.

THE COURT: It is not right. You are asking for --

MR. HRUSKA: We are asking for a per use license which would apply to music in the can. We are proposing that the cancellation rights, which would be a part of the per use system, should not apply to music in the can.

THE COURT: All right. I was mistaken and confused, and I recognize that now.

Then you are proposing, CBS is proposing as a plaintiff, as an entity --

MR. HRUSKA: Right.

THE COURT: -- that the cancellation right

which you have previously hypothesized as applying to the per use license system --

MR. HRUSKA: Right.

THE COURT: -- would not apply to music in the can.

MR. HRUSKA: Yes, your Honor.

THE COURT: I am willing to hear Mr. Sipes' views as to why CBS does not want it to.

MR. HRUSKA: Right. That's the point.

THE COURT: All right.

BY MR. HRUSKA:

Q Could you answer that question, please?

A Yes. CTN has over a hundred million dollars, approximately, now in inventory. When CTN purchased or produced the programs and the films in that inventory, of course we were under a blanket license, as we are still under a blanket license, and therefore of course we never went out and tried to get a license to music in that inventory at the time that the production was being made because, being under the blanket license, we weren't considering paying twice for the same music.

THE COURT: Never mind why you didn't license it. What you are telling me is you have a hundred million dollars worth of this material in the cans and you don't want

to have to pay for it again.

THE WITNESS: We'll pay on the per use basis, your Honor. When it is broadcast, yes. What I think I would like to say is that to put that inventory that is in the can in danger by allowing somebody now to pull that music and say you can't play that film unless you make a deal with me now is a rather rough situation.

I would think that we would pay for the music when broadcast under the per use system.

THE COURT: I understand.

Q Is it possible to remove the performance of the song from a tape or film?

A Yes, it is possible to remove it. But, of course, it is very costly, and in many instances you are creatively damaging your shows.

Q Will you give me an example of that?

A Well, for instance, take a theatrical film that was made years ago. First of all, you may have people who are no longer alive who were the stars of the picture. In other words, I am really trying to say, not to be smart about it, but you couldn't get all the elements back together again when you have removed, say, a feature performance in a motion picture, to refilm another feature performance in that film.

And even if the people were alive, you would probably have to rebuild the sets. I mean, the problems are enormous. The possibility of getting all the elements back together again is very, very slim.

Q What about just a television variety program you've got repeat rights to?

A There again you've got to get all the elements back that you had in the original program - the stars, the guest stars. You would have to rebuild the sets. Those sets may have been destroyed by now, and the job is incredible. It may not be able to take place. And even if it takes place, you never know that you've got the same creative meld that you had previously. And it is very, very expensive.

Q What about rescoring of background music of a dramatic program? What is involved in that?

A Well, you could remove that music and you could hire someone to rescore the music. Of course, you've got to pay for it. The man you are making the deal with knows that you've got something in the can, you know. But, again, it is a matter of cost. It is very costly and, again, you never know what you get. You know what you got in the first place, but in the second place, another creative element replacing an original creative element, you may throw out

the balance of the show. You never know.

Q Are there any instances in which music appears on the CBS television network without any notice?

A Yes.

Q Spontaneously?

A Yes, there are occasional spontaneous uses of music on the network.

Q Can you give us an example of those?

A For instance, you might have a football game. At half time the band doesn't play the song they told you previously they were going to play at half time, or you might get music out of the stands, some amateur people playing in the stands. You would have the same problem in a parade that you might pick up. You might have the same problem at a convention, a political convention: bands play music they didn't tell you they were going to play.

You might have new shows -- for instance, you might be interviewing somebody at an airport, and behind the man, out of the loudspeaker system, comes music over the Muzak system or whatever. Those spontaneous uses occur occasionally.

MR. HRUSKA: Your Honor, I would like to make a very short statement at this point to the effect that it is our belief that the kinds of uses of music or performances

of music Mr. Sypes has just described are fair uses under the copyright laws.

THE COURT: I understand that. You've stated in your brief, or alluded to, that doctrine.

BY MR. HRUSKA:

Q Assuming, Mr. Sypes, that they are not fair uses, assuming that they are subsequently held to be public performances for profit under the copyright laws, what would you propose, CBS propose, with respect to the applicability of the cancellation right to such uses?

A Well, the cancellation right should not apply in that situation either, and that situation --

THE COURT: I understand this to mean that it is CBS' position that the cancellation right with regard to such music is not part of its proposed per use license structure.

Is that right? We were talking about music in the can.

MR. HRUSKA: Again, your Honor, not quite.

THE COURT: Again, I don't want this from a witness. I've tried to make that basic. I want to know what CBS' position is on the point. Then, if you want to ask the witness why --

MR. HRUSKA: Okay. Let me ask the witness this

question. No. Strike that too. I suppose, under the gudelines we have previously discussed, this is a statement I should make, and let me make it right now.

We would accept a per use system as relief in this case even if the cancellation right were held to apply to such spontaneous uses. However, it will be our position at the relief stage of the case that it should not apply. I do not think that the question of whether it should or shouldn't is a liability question, and I'll pass it.

THE COURT: All right. Pass it.

Now let me ask. Mr. Topkis, am I correct that you had requested the Court to adjourn about this time?

MR. TOPKIS: I did indeed, your Honor. I would much appreciate it. I am not looking forward to it, but I would appreciate it.

THE COURT: I think, Mr. Hruska, we will adjourn now and reconvene at 2.15.

Is that it?

MR. TOPKIS: I think that would be safest. Yes, your Honor.

THE COURT: All right.

(Luncheon recess)

AFTERNOON SESSION

2:15 p.m.

D O N A L D S I P E S, resumed.

THE COURT: Mr. Hruska.

DIRECT EXAMINATION CONTINUED

BY MR. HRUSKA:

Q We were talking before the lunch break, Mr. Sipes, about the cancellation rights, which is a part of this per use system.

Do you -- and by "you" I meant CBS Television Network -- does the network have any practical need for that right to be exercised on notice?

MISS KEARSE: Objection, your Honor.

THE COURT: Well, until I can get a better feel of this situation I will allow this question, but it is without prejudice to a renewal of the objection later on when I can canvass the situation.

MISS KEARSE: I would also like to have the questions phrased in such a way that they don't suggest answers to the witness.

THE COURT: Sustained.

MR. TOPKIS: Your Honor, before we go on, just before the break -- and I ~~think~~ thank everyone for it -- I had thought that Mr. Hruska was asking some questions about a

right to withdraw spontaneous broadcasts and that had not been previously included in the statement of CBS's per use license, and I wonder, could we have some precision as to that; that is to say, is everyone in ASCAP to be forever at the disposal of CBS for spontaneity, or what?

THE COURT: It seems to me that the answer to some of these questions will have to come from argument when you sum up. Let's get questions and answers in the record so that I can have something to put my teeth into.

MR. HRUSKA: All I am trying to do now is to quickly ~~flush~~ Flesh out some of these basic elements so that I can then get into how the market is going to function under this sort of system, but I can't do that until I have a clear understanding on the record as to what the system is.

THE COURT: You are the one who is supposed to tell us what the system is, and to that extent I have sustained Mr. Topkis' objection.

When I say "you," I mean you as the spokesman for the plaintiff.

MR. HRUSKA: I understand.

THE COURT: And I would then be perfectly happy to hear questions as to why the hypothesized system is advantageous or disadvantageous or necessary or unnecessary.

(Record read.)

A Yes.

Q What is that practical need?

A Well, you have packagers and producers of programs who are putting their shows together. They get their musical compositions and then they nail down the other elements perhaps in a feature performance or variety show around those compositions.

Now, to have a situation whereby a packager would, for instance, rely on a musical composition being in the per use system Monday, and he goes forward that Monday getting scripts, hiring talent, getting a commitment from people to build sets, committing himself, and then having the musical composition pulled, say, on a Tuesday, the next Tuesday, gives a serious problem to us with that situation.

MR. HRUSKA: Your Honor, as part of my statement on behalf of the plaintiff in this case regarding the cancellation right and the notice of the cancellation right, I would like to hand up a form, simply for illustrative purposes, to show how simple a form could be used for the exercise of this cancellation right. And I will show one to the witness.

MISS KEARSE: May we have one, too, please?

MR. HRUSKA: Yes.

(Handing.)

MISS KEARSE: Your Honor, we have not had a chance to examine this before although we have had several exchanges of documents, and so forth, but this is new. May we have a few minutes to examine it?

MR. HRUSKA: This is, of course, not a document in the historical sense.

MISS KEARSE: In the futuristic sense, then?

MR. HRUSKA: Right, futuristic.

THE COURT: Let me say that I don't really believe that the introduction of such a document into evidence may be particularly objectionable since it only constitutes a feature of what CBS is proposing.

The purpose of this leg of the trial, among other purposes, is for CBS to specify what it is proposing and to indicate that that properly, if it can prove it, is feasible.

I don't believe that it makes much sense for others to object to the proposal. A proposal, in itself, is not being ruled on at the moment so it is a question of whether it is feasible, or whether it is feasible or necessary, of course, is what will ultimately count.

MR. HRUSKA: For discussion purposes, your Honor, may I have this notice marked as a plaintiff's exhibit for

identification?

THE COURT: You may.

(Plaintiff's Exhibit 86 marked for identification.)

MR. HRUSKA: I would also point out, your Honor, that this is not a formal proposal in the sense of "This is the way it must be or there can be no per use system." This is, as I said before, an illustration of the way it could be, which I think is really the issue at this liability stage of the case.

THE COURT: I don't understand the defendants to say that there are any practical problems for a composer or publisher to fill out a paper of this kind. They are raising much more profound issues like whether it is appropriate to ask that the per use license be issued on a withdrawal, in the first place, and on a withdrawal as to the other networks in the second place, and so on.

MR. HRUSKA: One of the main reasons I bring this out now is really to point out a couple of salient features of this.

One is that on the same form that there is a space provided for the copyright proprietor to exercise a cancellation right, there will also be a space provided, in fact immediately above it on this particular form, for the copyright proprietor to state the name and phone number

of a person whom that copyright proprietor has designated to deal directly, with direct licensing negotiations, for his music.

Also, on the second page, there could be a space providing for the copyright proprietor to set forth any prices that he might wish to charge for particular kinds of use without the need for any further negotiations, or any negotiation.

Also, we would propose that cancellations be made in one of two ways, essentially.

THE COURT: Mr. Hruska, I keep being bothered by the method of presentation here. We have a witness on the stand for the purpose of, even in the short period that we have been in progress, is to hear testimony. Now, I would like to put all this IN THE form of addressing yourself to the witnesss and asking him to assume that there will be a system which will do the following, and then ask him any questions that you want about it, about such a proposed system, instead of making a speech to me.

MR. HRUSKA: Right. I am making a speech.

The only reason I am doing that, in justification, your Honor -- and I was about to say this is the last thing I am going to say on this proposal -- I find it difficult to examine the witness regarding the workings of this system

until I have gotten before the witness and the Court on the table here what the system is going to consist of. I have just about done that, and the only thing I was going to add to it is that this cancellation right could be effected either at any time or a period of reasonable notice. We will get to that in a moment, or it could be done at regular stated intervals, like quarterly, four times a year.

THE COURT: I understand.

BY MR. HRUSKA:

Q Let me first ask you, Mr. Sipes, whether this form which you have now seen, whether that would serve your purposes as a practical matter.

A Yes, it would.

Q What would you do with forms of this nature that were completed by copyright proprietors and sent to CTN?

A Well, we would have a computer system and we would feed the information from these forms into that system.

Q Now, how much notice would you need with respect to this cancellation?

A I would think that at the beginning, at the outset, since there might at that time be a number of pulls or cancellations, that at that point we would probably need a couple of months to get the information into the computer and get it set up; thereafter, however, as we progressed,

I think that we could have reasonable notice probably in a matter of weeks.

Now, you mentioned this morning the fact that program packagers now obtain all elements of programs as part of the program package, that is, all elements other than music performance rights. Would a per use system, which is what we have been discussing, permit this function of obtaining music performance rights to be turned over to program packagers?

A Yes, I think it would.

Q How would you do that?

A Well, we would negotiate with packagers a budget for music in their package prices. We do that for other elements in the show. We build a package price. We can put an amount of money into the packages for music. At the beginning, again, of course, we would have to be flexible, we would be feeling our way towards what the right kind of music budget should be for particular types of shows. We have done that over the course of the years with other elements. I think we could work that out, and I think that packagers could then deal directly for music, and if they made their own direct deals, fine. If they wanted to use our per use system, we would debit the package, the price under the per use system there, and we would pay for the music.

BY THE COURT:

Q Can you give me an example of some other elements, as you used the term, for which you allocate a part of the price in reaching a package price?

A Scripts, your Honor, talents, performers, directors -- these are what we call "elements of the business."

Below-line elements -- by that I mean cameras, facilities. Above-line elements are what we call the creative items:scripts, all of the performers, the leads, the total cast, the director, the producer, and people of that type.

Q And how is this worked out mechanically in actuality? When you reach an agreement with a packager, do you simply agree, as a result of your own allocation of these various items, that you will pay them, let's say, a hundred thousand dollars, or do you pay them a hundred thousand dollars specificying that "X" is for talent, "Y" is for cameras, and so on?

A Well, again, the deals run the gamut, your Honor, but basically a deal is you pay the man a hundred thousand dollars. We know that scripts on a comedy show are going for around forty-five hundred dollars. You know that is in there. But sometimes you will have deals whereby you will have a package price, but it will only cover the lead up to

seventy-five hundred dollars. That means if the man is out in the market place and he is going for Mr. "X," and Mr. "X" wants ten thousand dollars, we ~~all~~ WILL go along with that, and put another twenty-five hundred dollars into the package.

Q Do you have a form of contract that you use in that that deals with packages?

A Yes, sir, several forms.

Q Would such forms be made available to the Court as exhibits?

A They could, yes.

Q I assume that what they do is to specify the elements for which the packager is responsible even if they don't allocate the cost of those elements, right?

A You would know that taking, for instance, a half-hour situation comedy, you will say that that's the kind of show that will have two star leads. Those kinds of things would be specified in a particular deal.

Q I see.

THE COURT: Thank you.

BY MR. HRUSKA:

Q Now, let's assume that CBS Television Network has a per use license of the type we described from ASCAP and from BMI, and let's go to the situation where the packager

of a television program has made his first tentative selection of a musical composition which he wants to use on the next program. Have you considered how that packager, in these circumstances, will be able to find out the status of that song, specifically, is it in the per use license or is it out of the per use license, what the price is or any other relevant information?

MISS KEARSE: Objection, your Honor. It calls for nothing but speculation as to what another party would do in these circumstances?

THE COURT: I don't construe it that way. This witness has been asked whether he has considered as to how that might be accomplished.

Overruled.

A Yes. What we would do is we would have a --

THE COURT: I don't think you were asked what you would do. I think you were asked what a packager would do under those circumstances.

Is that right?

MR. HRUSKA: That's the question, what a packager would do.

THE COURT: I take it what you really mean is what facilities would be available to him.

Q What facilities would you make available to a

packages so as to enable him to do this?

A What we would have is a program with computers, and all of the relevant information that we have on all the compositions would be fed into this computer.

This computer would show whether a song was in the per use license, what the schedule of fees was for that composition.

If the thing, if the composition had been pulled, we would have the name and phone number of a man ready to deal for the composition, or we might have the schedule of uses that the copyright OWNER has provided for us. All that information would be fed into this computer system and a packager or producer would call our music clearance department. He normally calls the music clearance today anyway under the blanket license because he usually calls to find out whether the use he is making for a particular use of music fits under the blanket license system anyway. And the people in the music clearance department could punch into this computer system and on a screen would appear all the relevant information which could be given to the producer right on the telephone.

In fact, and I am not a computer expert, I don't want to sound like one, but I think it is even conceivable that these screens could be placed in producers offices,

but I am not a computer expert.

And with that information the producer can act very quickly.

Q Suppose the song has been pulled?

THE COURT: That means that the copyright proprietor has withdrawn the license from ASCAP?

MR. HRUSKA: Right. Has withdrawn ASCAP's right under the per use license, right.

A Well, if the song has been pulled, the copyright owner who is looking for a better deal than the per use schedule of fees price, has provided, the name and phone number of the man who is going to deal for him, that information is passed onto the producer, the producer goes ahead and calls the gentleman, and attempts to make a deal.

Q Have you considered what would happen in the event that the copyright proprietor wants more money for that use than the producer-packager can afford to pay within the confines of what he has allocated for his music budget?

MR. TOPKIS: Are we now inquiring into what this man, this is the producer, would be --

THE COURT: I think the objection to that would be sustained. I overruled the objection to the last question because, as it turned out, what you really were asking was

what facilities would be made available by CBS to a producer, but if you want the reaction of what a producer would do, it seems to me we have to ask the producer.

MR. HRUSKA: All right.

THE COURT: We can all speculate.

Q Let us suppose that the producer or packager, in these circumstances, came back to you and said "I really need this song for my program," and he explains to you why that is so, but he says, "The copyright proprietor wants two or three thousand dollars for the use of that song and that's going to put me over my budget. I would like, Mr. Sipes, for you to give me more money. In other words, I want to renegotiate my package price with you."

What is ~~your~~ YOUR reaction under the circumstances?

MR. TOPKIS: If your Honor please, I submit that that question is just silly. We all know what the answer is. If he wanted it badly enough, he would pay for it. But is that really what we are going into for five weeks here?

THE COURT: I don't know. I would like to get the feel of the testimony to begin with.

THE WITNESS: Well, I think Mr. Topkis has said it, your Honor. If we feel that that's right, we do it.

We do it for other elements besides music all the time.

THE COURT: All right.

Q Suppose the composition selected by the packager hadn't been pulled from the per use licence, was still available under the per use license from ASCAP-BMI. Have you considered -- let me put it this way: What facilities would CTN make available to that packager to enable the packager to know how to reach the copyright proprietor in the event that the packager wanted to negotiate a direct deal?

A Again, at the outset, we would attempt to get the names and phone numbers of the people ready to deal for packagers who were still in the per use system also.

I think as the system goes on, as there are more and more direct licensing deals, those people will give us --

THE COURT: Well, that's speculation. What you are saying is CTN would make efforts to secure all this information and if it had the information it would give it to the packager, but if it didn't, it couldn't.

THE WITNESS: Right.

Q The ASCAP brief, the trial memorandum, has a statement in it to the effect that CBS expects that the per use license will be used rarely.

MR. TOPKIS: Are you referring to a particular page?

MR. HRUSKA: Page 44.

Q (Continuing) Is that your expectation, Mr. Sipes?

A Well, no. I think at the outset of a per use system that the per use license will be used. It might be used rather extensively. I do think that again you are in some kind of an evolutionary process, naturally, and as more and more direct licensing arrangements take place between packagers and copyright owners, then, of course, on that supposition the per use system may be used less and less as time goes on, when more and more direct licenses are made.

BY THE COURT:

Q Well, that is a truism, that the more direct licenses are made the less the per use licenses will be USED made. I suppose the really interesting question, assuming that you are competent to give an answer to it, is whether you believe that more and more people will license directly, and, if so, what your grounds for believing that are?

A Well, I believe that more and more people will license directly, your Honor, as time goes by. I think

packagers, as long as I have been in this business, packagers deal for all other elements in the open market, and that's the way they do business for other elements and that's the way I think they would do business here.

Also, I think --

Q But isn't the question not what they are able to do, but what the copyright proprietor will do?

A (No response.)

Q Obviously the two have to bargain on that proposition.

A That's correct.

MR.HRUSKA: May I ask this question, your Honor?

THE COURT: You are the lawyer.

BY MR. HRUSKA:

Q Do you have any basis for believing that there will be any facilities or mechanisms developed in the market place between the network and the packagers? In other words, the customers on the one hand and the suppliers on the other hand?

MR. TOPKIS: Can we get a yes or no to that?

THE COURT: The question is only whether you have any basis for reaching such a conclusion.

THE WITNESS: May I hear the question again?

THE COURT: Yes.

(Record read.)

A Yes.

THE COURT: What is your basis?

THE WITNESS: My basis is that there will be, as you said before, your Honor, there will be buyers out there and there will be sellers out there in the market place.

If the per use system is in effect, direct licensing in the market place will occur because besides the machinery in the per use system will spring up to broker those deals between buyers and sellers like they have done for all other elements of the programs.

There are agencies that deal in all other elements that go into making up programs today. There is the William Morris Agency, International Famous Agency, and other agencies that will certainly step into this area.

There is the Harry Fox Agency which brokers synchronization rights right now. I don't see why operations like the Harry Fox Agency or similar agencies won't get into this area. I think there is money to be made for people.

I think that, in other words, machinery like that, your Honor, will spring up to broker those deals

because there is money in the market place.

And if I may add, all other elements of programs are bought that way.

THE COURT: Yes. I am aware of that.

Q Getting back to the objectives that you have for the per use system, is there any alternative in your mind to that system which would achieve those objectives?

MISS KEARSE: Objection, your Honor.

MR. TOPKIS: Objection.

MR. HRUSKA: Let me make it more specific.

I will withdraw the question.

Q You talked this morning about a difference between the way in which other program elements and the way in which music is bought being one in which other program elements are bought in a competitive market and music is not.

I believe, Mr. Sipes, you have indicated that one of the objectives of this per use system is to be able to have music performance rights licensed in a competitive market.

The question is: Is there any other alternative form of relief in a lawsuit like this which you feel would accomplish the same objective?

MISS KEARSE: Objection.

THE COURT: Overruled.

MR. HRUSKA: What I am getting into, your Honor --

BY THE COURT:

Q Do you know of any other system or do you conceive of any other system which would permit you to accomplish the objectives you expressed this morning?

A I don't know.

THE COURT: You may cross-examine on this but he is entitled to a yes or no.

THE WITNESS: I don't know if the word, "system." is right, but I would think that an injunction prohibiting ASCAP and BMI from licensing television ~~networks~~ networks would do that.

MR. HRUSKA: The reason I asked that, your Honor, is really as a predicate to -- I mean, we all know now, particularly in view of this morning's discussion, that this is an alternative form of relief. Basically, what I want to get Mr. Sipes to testify about is how he sees the television network operating in such a world.

THE COURT: I would like to hear it.

MR. HRUSKA: Okay. I think the threshold question here ought to be:

BY MR. HRUSKA:

Q Would there be any practical need, from your standpoint, to have a deferral on the date on which such a world were to come into being? In other words, before the injunction were to be effective.

MISS KEARSE: Objection.

THE COURT: I don't think we need to worry about it at this stage of the game, Mr. Hruska. The possibility of this is so major a factor that if we ever get to that we certainly are going to have plenty of time to worry about when it would happen, both for the purposes of the plaintiff and the defendants.

I am willing to hear how CBS, as the plaintiff in this case, and as a major television network, conceives that music would be merchandised in the event that ASCAP and BMI were enjoined from licensing.

THE WITNESS: Well, under those circumstances, of course, all three networks would be in the same boat, your Honor, so that --

BY THE COURT:

Q When you say that, what do you mean? God didn't ordain the world that way. You assume that they would all be enjoined?

A Yes, sir. On the assumption that the ~~enjoinings~~ injunctions would be against ~~any~~ all of the other television networks.

Q Right.

A Under that assumption, all three networks are in the same boat. In other words, neither one of the three-- that's bad English -- but none of them have a competitive advantage, you see, over the others.

Q Assuming that, then what?

A Assuming that with a lot of struggle and some chaos up front, I think again that the machinery necessary to broker deals between the sellers and the buyers in this situation will spring up to fill that gap. There is a need, there is money to be made, and people will spring into that breach to fill that need and make it happen. And deals, direct deals will be made for musical compositions between buyers and sellers.

Now, I do believe, of course, that it will take some time for that machinery to develop up front, but of course all three networks in that situation would have that same problem.

BY MR. HRUSKA:

Q Suppose, Mr. Sykes, the injunctive order, in other words the order prohibiting ASCAP and BMI from licensing television networks, the effective date of that order was deferred for a period of, let's say, a year. Would that remove the struggle you mentioned earlier in your answer? Would that solve that problem, in your mind?

A I think that during that time the machinery would develop, yes, sir.

Q Now, what would you do about music in the can under this system which ASCAP and BMI have been enjoined from licensing television networks?

A I think music in the can in that situation is a serious problem for all three networks and that even under the injunctive relief some use payout system would have to be devised for music in the can.

Q As an alternative to achieving the objectives that you seek to achieve in this lawsuit, have you ever considered simply cancelling your ASCAP and BMI licenses and then embarking upon a program in which you and/or program packagers attempted to license their music requirements directly? In other words, have you considered a bypass of ASCAP or BMI?

A Yes, we did consider that.

MR. TOPKIS: Let's not lead the witness, your Honor. I think the question was did the witness consider it, and his response began "We considered it."

THE COURT: I'm satisfied to let him testify as long as he makes a distinction between his own consideration and what he knows to be as an officer of CBS.

But would you try to give me an accurate feel of that? The purpose is not only for me to get an accurate feel, but so that Mr. Topkis and Miss Kearse can fairly cross examine you on it.

THE WITNESS: Let me say, your Honor, maybe I am speaking in the editorial "we" there, and I should not be doing so. Yes, I have considered it myself.

Q And what have you concluded?

A I came to the conclusion that that was a route I could not tell the network to go.

THE COURT: Would you explain why?

THE WITNESS: Yes. As far as I was concerned that would put us at a serious competitive disadvantage with the other two networks, and if we went that route we would be in serious difficulties.

Q Could you briefly outline some of the reasons why you believe that you would be at a competitive disadvantage

under those circumstances?

A Yes. If I bypassed -- and I am assuming that NBC and ABC would not, that I'm going this route by myself -- I have serious problems. Of course, I've got the music in the can problem, which to me alone literally militates against my taking that approach. Then I've got the problem of commercials in the can, which again, as far as I am concerned, stops me cold from taking that approach.

On top of that, for programs that are going to be produced for the network, I've got rather substantial musical requirements for the programs to be produced. Almost all of our programs use music.

There is, of course, the typical production problem of short span of time. Time is important in putting shows together and nailing the music into the shows.

Also, as we discussed before, there is no machinery in the marketplace for brokering these transactions between people. The packagers of the programs would have to find out who the copyright owners were and then try to reach them, and after they reach them they would have to try to make a deal with them. There is no machinery there to broker these deals. I think this would be a serious problem.

Overriding that, though, is my belief that many

of the publishers and writers, many of the copyright owners, would be reluctant to see us succeed in a bypass situation and they would hope or expect that we would come back into the blanket license system.

MR. TOPKIS: I move to strike so much of the witness' answer as began "Overriding" on the ground that it is the sheerest speculation.

THE COURT: He was asked why he felt that CBS should not go this route, and that certainly is one of the reasons why he felt that way. It isn't any more evidence than that.

Q What do you believe, Mr. Sypes, is the net of all this in terms of effect on CTN programs?

A Well, I think the net effect --

MR. TOPKIS: I object to that question. I don't understand what net is referred to and what effects it refers to.

THE COURT: Let's see if the witness understands the question.

MR. HRUSKA: Mr. Sypes has described a series of factors, and I am simply asking him what effect or impact those factors would have on the CTN program.

THE COURT: I think it would be helpful to all of us if you specified which effects. Are you talking about

what effect the existing system has or the lack of ability to bypass or what?

MR. HRUSKA: No. The prior question was the reasons that Mr. Sypes felt that CBN would suffer a competitive disadvantage in the event of a bypass.

THE COURT: Yes.

MR. HRUSKA: And he has outlined those reasons.

THE COURT: All right. What is the next question?

MR. HRUSKA: He has outlined those reasons in terms of various factors, and now I am asking him to tell us specifically what impact those factors would have on your programs, do you believe.

THE COURT: If what?

MR. HRUSKA: If they occur.

THE COURT: All right. Which assumes an attempt to bypass it, I take it.

MR. HRUSKA: Right. Exactly.

THE WITNESS: On the attempt to bypass, the effect, as far as I can foresee it, is that we will, of course, creatively affect our programs. They will be badly hurt. CBS' programs will be badly hurt. The ratings of those programs will decline. When the ratings decline, naturally sponsors are going to pull out and go elsewhere

or come in and ask for cheaper deals, which means that my revenue is going to be seriously affected. And, as we found, every time you hurt yourself in a time period, by which I mean where your audience ratings are down, it takes you a long time to build them up again. You are in bad trouble.

Q You mentioned before as part of your prior answer that you were assuming that the NBC and the ABC television networks did not follow you into a bypass. What is your basis for that assumption?

MR. TOPKIS: Could I hear that question?

THE COURT: Yes. What is the basis for the assumption that ABC and NBC would not follow CBS if CBS attempted to bypass.

MR. HRUSKA: The accoustics in here are bad.

MR. TOPKIS: Did the witness say that?

THE COURT: Yes.

MR. HRUSKA: He did say that.

MR. TOPKIS: I am having trouble hearing.

MR. HRUSKA: It is very hard for me to hear.

THE COURT: You will have to talk up, Mr. Sypes.

THE WITNESS: I am trying.

THE COURT: The accoustics in the room are really not satisfactory. If necessary, we will see if we can

get a microphone for future witnesses. I can't rebuild the courtroom. But it would help if you give your full volume.

THE WITNESS: If I may again, could I hear the question again? I'm sorry.

Q Let me restate it, to save time. You had mentioned in your prior answer that you were assuming that if the CBS television network went into a bypass, NBC and ABC would not follow. I would like to know what the basis is for your assumption.

A The basis for that is that they would like to stay in the blanket license and watch me destroy myself. I think they are as intelligent as I am, or ~~am~~ As unintelligent as I am, and that they would know that I would be putting myself in a terrible competitive disadvantage, and they would be very happy to see me do so.

Q Would you follow NBC into a bypass?

A No.

Q All right. I would like to take up separately some of the points you mentioned. You used the phrase "commercials in the can." What do you mean by commercials in the can?

A Well, what I mean by commercials in the can are those commercials prepared by advertising agencies to

exhibit the wares of their advertisers. Those commercials I would say almost always use music. They are played over and over and over again, especially if they are successful.

THE COURT: You're telling me?

MR. HRUSKA: We all suffer from that.

THE WITNESS: We all suffer is right. But we like it, your Honor.

These commercials are played over and over and over again. In fact, in many of them the music helps identify the product.

Now, these commercials in the can, the cost of those things in the aggregate must be millions upon millions of dollars. It is my understanding that in many instances the advertising agencies do not get the music performance rights when they make these commercials because, naturally, they rely on the musical performance rights of the network.

MR. TOPKIS: If your Honor please, that last part I would suggest should not be deferred for cross examination because we'll have a record where the witness will subsequently be quoted as knowing something about that subject and testifying about it. It seems to me that this is a particular area where guesswork is inadvisable.

THE COURT: Well, again, I take this quality of

statement to be merely the basis upon which Mr. Sipes is expressing his own views as to why he would not bypass or why he personally, as a man with a good deal of experience in this field and an officer of CTN, would not advise CTN to attempt this.

I fully understand that he has not said that he knows this but merely that he understands that to be the point. And if CTN wishes to prove that point, they will have to call somebody with first-hand knowledge.

MR. TOPKIS: All right.

MR. HRUSKA: Your Honor, may I at this juncture, because I think it aids the continuity of the presentation, read a very brief excerpt from the deposition of Mr. Brettler, who is an officer of Shapiro, Bernstein, which is a party defendant in the lawsuit, and Mr. Brettler is a member of the ASCAP board. He testified on this subject of commercials in the can, as to one aspect of it which I think would aid the flow, if I can briefly read it into the record.

THE COURT: As long as you allow Mr. Topkis to get a look at it or to see a copy.

MISS KEARSE: I think we should have the right to cross examine Mr. Sipes without having his testimony interrupted by the presentation of deposition

testimony of others, and I think that after the reading of the deposition testimony of others we should have the right to make readings of other portions that we deem necessary in the interest of fairness. I think this is just making a shambles of this.

THE COURT: I don't know that it makes a shambles, but I think Miss Kearse is right, that it would be more orderly for us to take one witness at a time, and the mere fact that somebody else happens to have been deposed really doesn't remove him from being another witness. I have enough ability to coordinate my recollection of what is going on here so that I can take this deposition after Mr. Sypes concludes.

If you want to state during the course of any testimony of a live witness that you expect to corroborate his assumptions by reference to a deposition hereafter that will alert me to it as you have now done here, I will bear that in mind.

MR. HRUSKA: We did in terms of notice to the other parties give notice last Thursday pursuant to the pretrial order that we would be doing this.

THE COURT: Well, it is not just a question of notice but a question of orderliness of procedure. So let's just save this until Mr. Sypes concludes.

THE WITNESS: I think I was in the middle of something.

MR. HRUSKA: Would you read back where we left off.

Q Do you recall your answer?

A I think so.

THE COURT: Mr. Topkis had objected to Mr. Sypes saying that he understood that advertising people had not paid for the performance rights of music in the commercial in the can.

A (Continuing) Therefore, of course, they've relied in many instances -- I forget exactly the words I used.

Could I have the last bit of my testimony back?

Anyway, these commercials in the can raise a serious problem in this instance because if the copyright owners of music that are in those commercials would have the right now to ask or request payments for music performance of those commercials, this of course would drive the sponsors off our network onto another network, because they could be stuck up by these people for inordinate amounts of money.

THE COURT: Am I correct, sir, without challenging that, in understanding that the commercial in the can problem is just a special aspect of the music.

THE WITNESS: That's correct.

BY MR. HRUSKA:

Q You also mentioned in your recitation of reasons why you thought CTN would be at a competitive disadvantage in the event of a bypass the fact that CTN has large music needs. Let me first ask you on this, how many CTN programs are there in the course of a given year?

MR. TOPKIS: In the course of a given what?

MR. HRUSKA: Year. Excuse me.

(Discussion off the record.)

THE COURT: Let me ask for a qualification to your question. When you ask how many programs CTN has in a given year, are you referring to distinct programs or, for example, in Gunsmoke, would you count that one or 52 or what?

MR. HRUSKA: No. Distinct programs. And I mean to confine this also to television network programs, distinct television network programs. In other words, if there are 10 episodes of Gunsmoke appearing on 10 different weeks, we count that as 10 programs.

THE COURT: You do.

MR. HRUSKA: Yes, for the purpose of this question.

THE COURT: That's what I mean, for the purpose of

this question.

A In the course of a year there are about 3600 programs a year, network programs a year.

THE COURT: Does that mean that there are 3600 programs that use music or does that, for example, include news network specials?

THE WITNESS: That, sir, would include news specials. I am giving you the total number. And it fluctuates a bit from year to year.

THE COURT: I suppose the very substantial majority of those programs do use music; am I correct?

THE WITNESS: Yes.

MR. HRUSKA: That was my next question.

Q Do all these programs use music?

A Well, they all use planned music, except for news programs, and some news programs have spontaneous music on them once in a while.

Q I would like to show you, Mr. Sipes, Sypes, exhibits that have been marked for identification as PX540 through PX544 (handing). What are those documents that I have just handed you?

MR. TOPKIS: May I request that we take them one at a time? They seem to be multi-paged documents.

THE COURT: Yes. If the witness didn't plan to do

that, I would ask him to specify one at a time what they are, what is 540, what is 541, and so on.

A 540 is the 1972-1973 CTN nighttime schedule notice.

THE COURT: In effect, the schedule of what you plan to show.

THE WITNESS: Yes, sir.

THE COURT: During the night?

THE WITNESS: Correct.

THE COURT: Does that color mean that these programs, just a matter of curiousity, are shown only in color.

THE WITNESS: They are shown in color. On a black and white set you would pick it up in black and white. But they are transmitted in color.

THE COURT: Right.

THE WITNESS: 541 --

MR. TOPKIS: Excuse me. I don't mean to interrupt, but there is something curious about this. It is dated August 21, 1965 on my copy.

THE COURT: Where is this date.

MR. TOPKIS: At the upper right.

THE COURT: I have 8/21/72 on mine.

MR. TOPKIS: Mine reads 8/21/65.

THE COURT: You had better keep it. It may be valuable.

THE WITNESS: That is a prophesy of the future dated 1965.

MR. TOPKIS: Should it bear another date? Could I just know it? I'll be happy.

MR. HRUSKA: 8/21/72.

THE COURT: All right. 541?

THE WITNESS: 541 is the nighttime schedule notice for 1971-1972.

THE COURT: Is each one of these for a different year?

THE WITNESS: Yes, your Honor.

THE COURT: As indicated?

THE WITNESS: Right.

THE COURT: All right. I think that satisfies you, doesn't it, Mr. Topkis?

MR. TOPKIS: Yes, your Honor.

BY MR. HRUSKA:

Q Let's go back to 540, PX540.

A That is the 1972-1973 schedule.

Q Right.

After the first two pages of that exhibit there are another few pages encompassing the same schedule.

Do you know what the purpose of that is?

A Well, unless there had been a mid-season change in programs, they would appear on the second sheet.

THE COURT: I notice that the third sheet -- that is the first sheet of the second grouping -- has a different date in the upper right-hand corner.

Is that to signify that it is reviewed and revised every so often.

THE WITNESS: Right. It is updated to take into account changes in schedule.

THE COURT: Right.

Q Do you know who prepares these documents?

A These documents are prepared by the program department of CTN.

Q In the regular course of business?

A Yes.

MR. HRUSKA: I offer them in evidence, your Honor.

THE COURT: Any comment?

MR. TOPKIS: No objection, your Honor.

MISS KEARSE: I would like a voir dire, your Honor.

VOIR DIRE EXAMINATION

BY MISS KEARSE:

Q Is Mr. Sypes in the program department?

A Do you want an answer to that question?

No, I am not.

Q Does that department report to you?

A No, it does not.

MISS KEARSE: I object to the admissibility of this, your Honor. This witness hasn't given us any indication that it is --

THE COURT: I think you are right. Do you really want them to bring another witness in just to put that in evidence? If you insist, I will sustain your objection.

3/ MR. ERUSKA: I find it hard to understand why this is being objected to. The only reason we are putting this in --

THE COURT: Do you have any reason to doubt the authenticity of the document?

I don't know what it proves.

MISS KEARSE: This witness is not able to verify the contents of it.

THE COURT: I understand.

All right, I will sustain your objection. But I

urge counsel not to make objections unless there is something central to the case which they feel is an abuse of their rights.

MR. HRUSKA: I won't even argue, your Honor. If we do have somebody later on in the case who is in the program department, I can put it in through him.

THE COURT: Bring him in tomorrow morning.

MR. HRUSKA: It is simple, basic information, it seems to me, for background purposes.

I was going to offer in evidence a list of the CBS specials, and I assume that the same objection would be made as to that list.

MISS KEARSE: If it is subject to the same disability, yes.

MR. HRUSKA: Mr. ~~Sypes~~ Sipes has not become a member of the program department in the last two moments, so we have the same disability.

BY MR. HRUSKA:

Q Mr. ~~Sypes~~ Sipes, how many variety programs, musical variety programs, were there on CTN at night in 1970?

A In 1970?

Q Yes.

THE COURT: Can you refresh your recollection by looking at the exhibit?

THE WITNESS: Yes, I could, your Honor.

MR. BRUSKA: The exhibit was just didn't put in evidence.

THE WITNESS: A lot of shows come and go, your Honor, and I wouldn't mind taking a fast look.

THE COURT: Take a look.

(Pause.)

A In 1970.

Q 1970.

A And the question was the musical variety shows?

Q Yes; nighttime.

A Nighttime.

MR. TOPKIS: Which part of 1970.

Q Take the first part of 1970.

THE WITNESS: The fall of 1970, which was the commencement of the programming season.

MR. TOPKIS: Very good.

Q Could you give us the names, the titles of the muscial variety programs in that category?

A Yes. It would be the Ed Sullivan Show, the Glen Campbell Good Time Hour, the Tim Conway Hour, the Carol Burnett Show.

THE COURT: Before you go on to the Carol Burnett Show, are you looking at Exhibit 542?

THE WITNESS: Exhibit 542, yes.

THE COURT: Maybe I started on the wrong page, but you jumped from Tim Conway to Carol Burnett.

THE WITNESS: Yes.

THE COURT: That's because these other programs in between are not classified as variety shows, is that correct?

THE WITNESS: They are not musical variety shows, your Honor.

THE COURT: All right. I'm quite sure I understand precisely what the definition is, but --

THE WITNESS: Do you want me to try?

THE COURT: Sure.

THE WITNESS: Musical variety shows are usually a one-hour tape show with a lead or leads who are either comics or singers or versatile performers in both of those areas, and maybe even a dancer.

THE COURT: So Here's Lucy is not a variety show because she doesn't sing.

THE WITNESS: She does a half-hour situation comedy with a script that has a story from beginning to end for a half hour.

THE COURT: I understand.

THE WITNESS: I left off, I think, with the

Carol Burnett Show.

BY MR. HRUSKA:

Q May I just interrupt there with a question? Talking of the Lucy Show, does the Lucy Show have musical variety sequences or some of its episodes devoted --

A From time to time, yes.

Q -- to that format?

A Yes.

Q Proceed.

A The Merv Griffin Show. Hee Haw. The Jim Nabor's Hour. That's it.

Q I lost count. Did you keep a tab on that?

A I think it was seven.

THE COURT: Is that per week?

THE WITNESS: That was on a weekly basis, your Honor, yes. The Merv Griffin Show, of course, appeared nightly, five nights a week.

Q How many musical variety programs are on the network now, the CBS network?

A Three.

Q What are they?

A They are the Carol Burnett Show, the Sonny and Cher Show, and the Bill Cosby Hour.

Q Why has that number dropped from 7 to 3 from 1970 to date?

A Well --

MR. TOPKIS: If your Honor please, if the witness made the decision to make the reduction, I would have no objection to his answering the question. But otherwise --

THE COURT: I don't think he has to make the decision himself if he participated in making the decision.

MR. TOPKIS: Very well.

THE COURT: Did you participate in making the decision?

THE WITNESS: Yes, your Honor, I did. But the answer to that is it is called in the business the pendulum. Types of shows go into favor. Then they go out of favor. Then they go into favor.

THE COURT: You are explaining the popular reaction. But what was the reason that CBS decided it or?

THE WITNESS: The reason CBS decided was because the ratings on many of those shows fell off. They fell off because the people weren't watching them as much, and we are constantly looking for new leads for those shows, and it is very difficult to find them.

THE COURT: All right.

Q Do you have a business judgment as to what the prospects are for musical variety programs on CBS television network, long range?

A Business judgment from my knowledge inside the network, we would like more.

THE COURT: I didn't understand the question to be what you would like but what you expected.

THE WITNESS: We would expect more.

THE COURT: In other words, you expect some kind of turn around to occur in the foreseeable future?

THE WITNESS: Yes.

THE COURT: A change in popular taste?

THE WITNESS: Right, your Honor. And, finding the right people. We are always in a search for them.

THE COURT: Mr. Topkis, I know that for personal reasons you may want to stand from time to time. I am not sure whether you are addressing the bench or whether you are just making yourself more comfortable for a moment.

MR. TOPKIS: Right now I am trying to hear what Mr. Hruska is about to say.

MR. HRUSKA: Let me just say this. We, of course, had a deadline, as it were, on April 13th, as I remember it, to designate documents. We attempted to complete a computer study which was then ongoing by that date and we thought we had, and a document very much like this with somewhat different numbers was submitted to ASCAP as was, pursuant to the pretrial order, the computer printout backup.

After that was done, rather than just sit there, because we knew that this had been done under extraordinary around the clock conditions, we thoroughly rechecked everything in that study.

As a result of that, I might say, we originally had timings in the first study, that is, timings that went along with these numbers of performances, total duration of performances. We doublechecked those and there was enough inaccuracy in what we saw on a spot check basis that we just removed that from the study.

These numbers themselves have changed -- I shouldn't say how much they changed. I just don't have the information. But, in any event, because this was rechecked and rerun, we did not get the second run, the computer backup, to the defendants until late yesterday. Because of that I will not be offering this document in evidence today.

I think they ought to be given an opportunity to look at the backup material we could provide only yesterday. But since we had Mr. ~~Sypes~~ Sipes on the stand today, I thought I would ask him some questions concerning the study perhaps sufficient to qualify it when we at a later stage of the case actually offer it in evidence, and at that time, if BMI or ASCAP have any objections or have seen inaccuracies or whatever, that can be raised at that time or perhaps that can be worked out between us.

I also say on this, I don't know that the finite numbers here are of great significance. The only reason we ultimately will be offering this document is really to give an idea of the magnitude we are talking of in terms of numbers of performances.

MR. TOPKIS: Your Honor, there need not be any dispute about this, but right now we haven't had an opportunity to check these numbers.

THE COURT: I understand.

MR. TOPKIS: I am sure Mr. Sipes could make this study. So what are we wasting time for now?

THE COURT: I guess Mr. Hruska wanted to explain why he is dealing with something you just saw yesterday.

Let me just ask BMI and ASCAP, if I may, whether, not committing them to agreeing with these figures, it is their contention that the case would be substantially affected by the question of whether in 1970 there were four thousand performances instead of 4087 performances. I assume the answer is no.

MR. TOPKIS: Of course.

THE COURT: All right. With all these explanations, is that your position, too?

MISS KEARSE: Yes.

THE COURT: Then go ahead, and if there are corrections to be made they will have to be made or adjustments --

MR. HRUSKA: Let me simply ask this, then.

BY MR. HRUSKA:

Q Mr. Sipes, do you know how the study which came up with these numbers was made?

A It was made by the music operations department under Mr. Poklitar.

Q Who is he, since you've brought out his name?

A He is, I think, assistant director of music clearance; and some parallel people of the Cravath firm who, I take it, took -- who took the first thirteen weeks of 1970 and the first thirteen weeks of 1972 and took the music logs and the cue sheets --

MR. TOPKIS: Your Honor, whoever did it can tell what he did much better than Mr. Sypes.

THE COURT: I think so, too.

Why don't you just say assuming that these figures are correct and then ask Mr. Sypes whatever questions you want about it. You'll have an opportunity to establish that these figures are correct.

MR. HRUSKA: No, I'm not trying to establish the figures.

THE COURT: What are you trying to establish?

MR. HRUSKA: I simply want to bring out how this thing was done. And to call an extra witness to describe that is a colossal waste of time.

THE COURT: I don't agree. If it is of any importance, let's have the man who did it. If it is not of any importance, then let's stipulate it. But there is no point in taking Mr. Sypes, who knows no more about how this is done than I do. He has just been told.

I don't understand that Mr. Topkis or Miss Kearse at this point are challenging the accuracy of these figures. But if they do challenge them, you are certainly going to have to call a witness who did something, I mean who actually conducted the study.

MISS KEARSE: If we do challenge it, we would like to challenge the person who made the study.

THE COURT: You are entitled to. But I am prepared, in view of the fact that a witness is on the stand, to ask questions assuming these figures are correct, and then, if they are shown to be incorrect, it would be a question of whether they are substantially incorrect or just partially.

MR. HRUSKA: I would not have gone into it except for the fact that the music clearance section, which is a group in CBS which handles these music logs and cue sheets, is part of the business affairs department, which is Mr. Sipes' department. It is under his direction.

THE COURT: When it comes to a question of accuracy of figures, I don't think you can say that is adequate proof. The president of a bank can't say that the auditor conducted an accurate audit. It is the auditor who has to be questioned.

MR. HRUSKA: Okay.

BY MR. HRUSKA:

Q You also mentioned before, Mr. ~~Sypes~~ Sipes, in your recitation of reasons as to why you thought CTN would be at a competitive disadvantage in bypass your belief that many writers and publishers, members of ASCAP and BMI, would not want a CTN bypass to succeed.

Now, on what do you base that belief?

THE COURT: Again, Mr. Topkis, I am just getting this gentleman's beliefs.

MR. TOPKIS: Okay.

A Well, my belief is that they wouldn't because, first of all, I would be asking those people to make a change in the way they've been doing business for a long time. I don't think businessmen who have been doing something for a long time like to change what they've been doing.

Also, the change I'm speaking of, asking them to make, would be rather a revolutionary change and it would open up certain risks to these people because basically I believe that people like to deal in a non-competitive market instead of a competitive market, and what I would be asking ~~here for~~ For HERE would be for these people to be dealing in a competitive market.

Also, they've been living under this system for

Sipes

a long time. They seem to like it. Otherwise I think they would have changed it themselves.

MR. HRUSKA: In light of what your Honor said before about the reading of materials, perhaps I ought to, before I start this, state what I would propose to do.

I would propose at this point to read to Mr. Sipes ~~Sypes~~ some relatively brief excerpts from depositions in the case, I think four depositions, probably taking about three or four, maybe five minutes to read.

THE COURT: And then ask him questions about them?

MR. HRUSKA: Yes. But I should say, basically the question I would ask him about those materials is how those statements that I would be reading from the depositions affect his judgment on the question, and the reason I would be doing that, your Honor, is because, as the issues have evolved in the case, I think one important aspect of it comes down to whether a reasonably prudent manager of a television network would consider this bypass to be a reasonable risk to take or whether it is an irrational risk to take.

Now, I think the attitudes as expressed under oath of the other side of this market, the copyright proprietors, mainly the publishers, is quite pertinent --

THE COURT: Let's assume it is. What you are trying to do ultimately is to persuade me --

MR. HRUSKA: Yes, of course.

THE COURT: -- that would happen. I mean, you can persuade me, if you can, by reading the depositions or putting them into evidence directly and not saying Mr. Sypes, would this make you feel that way all the more stronger. It seems to me it stands to reason that if Mr. Sypes feels as he does on the basis of the factors he has just enumerated and he heard three other witnesses testify along the lines that you have led me to believe that they did, he would of course say that that would make him feel even stronger, more strongly.

It wouldn't mean very much to me if he did.

MR. HRUSKA: Obviously I want to get it on the record because --

THE COURT: You can get it on the record without putting it into his testimony. Just read it in some time.

MISS KEARSE: Assuming they are admissible, your Honor.

THE COURT: Of course.

MISS KEARSE: We may have an objection.

THE COURT: You keep raising technicalities.

BY MR. HRUSKA:

Q Have you considered how the desire of writers and publishers that any CTN bypass not succeed --

MR. TOPKIS: Can I hear that again, please?

THE COURT: Let him finish the question.

MR. HRUSKA: Let me finish the question.

Q (Continuing) -- would be likely to manifest itself in the event that you attempted a bypass?

THE COURT: Would you read the question, Mr. Reporter?

(Question read)

MR. TOPKIS: I object to the question on the ground I don't understand it.

MR. HRUSKA: When it was read back, I didn't understand it either. Let me restate it.

THE COURT: Please rephrase it.

Q You've testified already, Mr. Sipes, that you have the belief that writers and publishers would not want a CTN bypass to succeed. Have you considered how that desire on the part of writers and publishers would manifest itself in the event you --

THE COURT: In other words, what do you think they would do?

MR. HRUSKA: Right.

MISS KEARSE: If his belief is correct, as to which, of course, there is no evidence yet.

THE COURT: I understand that.

What is your expectation as to how copyright proprietors would react if you attempted a bypass?

THE WITNESS: I think, your Honor, that they would be unwilling to deal with us.

MR. TOPKIS: They would what?

THE WITNESS: Would be unwilling to deal with us.

Q Do you think in a bypass attempt you could hold out against such unwillingness?

MR. TOPKIS: Your Honor--

THE COURT: I will take judicial notice that CBS doesn't have to have music if it doesn't want it. I don't think that ASCAP or BMI dispute that, do you?

MR. TOPKIS: Technically it is in the public interest for them to have music.

THE COURT: Well, I am not going to require him to ask that.

MR. TOPKIS: But I still don't think, your Honor, that this talk about hold-outs really contributes very much.

THE COURT: It seems to me that that comes to argument and summation.

It may be that Mr. Hruska is wasting the whole day, and that is at his peril, but if his questions are admissible, he is entitled to ask them. I will allow the question.

In your opinion, would CBS be able to hold out--I assume that means without using music--if it attempted to bypass and could not negotiate with anybody?

Isn't that your question? If you have a license with ASCAP, you are really not holding out.

MR. HRUSKA: Mr. Sipes, of course, admitted that many publishers would have this attitude and, in effect,

would not be willing to deal, and I don't know that anybody can say that the entire membership of ASCAP and BMI would be in that position.

THE COURT: Of course, one of the problems is that nobody is in a position at all to say with complete accuracy anything like that because even the experts are hypothesizing.

MR. HRUSKA: It has never happened. I think it is probably significant in and of itself that it hasn't happened, but I just want to probe Mr. Sipes' mind here as to whether, confronted with a certain unwillingness on the part of writers and publishers to deal, which you are hypothesizing, you could hold out against that?

A No, I don't believe that I could hold out against that.

Q Why is that?

A I think from the beginning that CTN would be on the ropes. Time would always be running against us. We are in this serious competitive and disadvantaged situation, and it would not be very long before I would have to come back and take a blanket license.

BY THE COURT:

Q I think I know the answer to this but I think it ought to be in the record anyway.

Has CTN ever made any attempt to bypass?

A As far as I know, they made no attempt to bypass because we have had a blanket license, and we know that we had a blanket license, and we knew that if we dropped our blanket license and tried to bypass we would end up just where I said we would end up.

MR. TOPKIS: Your Honor, again a matter of nomenclature. Could we ask about direct licensing instead of bypassing? I think "bypassing" suggests something that is-- I don't know what it suggests but "direct licensing" is the trade term that everybody knows. "Bypassing" is something that has been conceived for this litigation.

I think that all of us will understand each other better if we--

MR. BRUSKA: The term or the word "bypass" first came out of the ASCAP brief on the summary judgment motions. It is ASCAP's word.

THE COURT: I really think it is piccayune. I would prefer to use a word that everybody understands. If we could agree that there was only one term that everybody understood, I would impose the use of that term.

Frankly, Mr. Topkis, I don't understand. I believe your brief and Miss Kearse's brief referred to "bypass" and I have not worried about it, still don't. I understand "bypass" to mean the same as direct licensing, at least

when we are talking in terms of the present system.

BY MR. HRUSKA:

Q Mr. Sipes, do you know anything about the ability of a music publisher to license performance rights for television use in the absence of his writer's consent?

A I am not an expert in the music publishing business.

THE COURT: Are you asking about the legal aspects of it, or what?

MR. HRUSKA: Well, I could break it down into practical and legal.

THE COURT: Well, as far as legal is concerned, I don't think we ought to call on Mr. Sipes to instruct us.

If there are some practical aspects that he knows about I would be happy to hear them.

MR. HRUSKA: I really don't want him to instruct us, your Honor, on any aspect. I want his state of mind because, again, I think his state of mind on this point is quite relevant.

MR. TOPKIS: Your Honor, I object to that. The state of mind of someone who is totally uninformed cannot be relevant to anything.

MR. HRUSKA: We don't know that he is uninformed, your Honor, until we ask the question and get an answer.

THE COURT: Ask the question again, but I am just telling Mr. Sipes I don't expect him to testify with regard to the legalities of copyright assignment, and so on.

THE WITNESS: I couldn't.

MISS KEARSE: Mr. Sipes started out by saying that he was no expert in this area. I think that probably gives us some light on the subject.

THE COURT: Repeat the question, please, Mr. Hruska.

MR. HRUSKA: Yes, I will, your Honor.

BY MR. HRUSKA:

Q Do you know anything about the ability of a music publisher, in a practical sense as distinguished from a legal sense, to license music performance rights for television network use in the absence of the writer's consent?

MISS KEARSE: Your Honor, I object to that question unless the answer is going to be based on the witness's own knowledge and not on--

THE COURT: The question as put is does he know about it, anything about it. Let's get an answer to that question.

Do you know anything about it?

THE WITNESS: Only generally, your Honor. It is general knowledge that you pick up in the business, but I

am not an expert in this area, not--

THE COURT: Then I don't think we ought to have any matters such as this except from people who can say they are experts or who have had valid personal experience with it.

I understand from what you say that you have not had valid personal experience on this subject.

THE WITNESS: That is correct.

THE COURT: All right, gentlemen, let's take a short recess.

(Recess.)

DONALD SIPES resumed.

DIRECT EXAMINATION (continued)

BY MR. HRUSKA:

Q With respect, Mr. Sipes, to your belief regarding the unwillingness of writers and publishers to deal directly in the event of a CTN bypass, would you be concerned about the same problem under a per use system given the right of copyright proprietors in that system to exercise cancellation rights; in other words, pull music out of the per use license?

A Yes, we would be concerned about that.

Q How would you propose to deal with that?

A I think that could be handled--

MR. TOPKIS: Excuse me, your Honor. How he would propose to deal with it?

THE COURT: Yes.

MR. TOPKIS: That is something that should be coming from CBS counsel; not from this witness.

THE COURT: If you want to tell us how CBS would intend to deal with it as to the advantages or disadvantages of that, I would be glad to take that.

MR. HRUSKA: All right, your Honor.

We would propose, at the relief stage of this case, that the right to cancel be exercised across the board as to all three television networks.

We would make that proposal based upon what we think the evidence in this case will ultimately show, and that is--

THE COURT: Well, you don't need to do that at this stage of the game, to justify the proposal.

I am really asking you at the present time, is it the basis of the present question to the witness?

MR. HRUSKA: That's right, but I must continue, to make this a fully rounded presentation, to state that--

THE COURT: Right.

MR. HRUSKA: --we would have been concede, I believe, that there is another possible way to deal with

this problem, and what it comes down to, I think, is this, your Honor--

THE COURT: Mr. Hruska, again, let's not get mixed up between arguing the situation and telling us, all of us, the court and your opponents, what CBS is proposing. CBS can propose an alternative plan if it wishes to do so.

MR. HRUSKA: That is what I am getting to, and the alternative plan would be this: Focusing on the point in time in which there is a final decision in this case, and assuming that it is a decision to set up a per use system, there would necessarily have to be some time lag between that point in time and the effective date of the system.

THE COURT: Yes.

MR. HRUSKA: Now, within that time limit we would propose that copyright proprietors be given a date within which to exercise their cancellation rights.

We would also propose--

THE COURT: Let me see if I understand this as we go along.

I don't know if that is an alternative to what you are stating that you propose or a condition of what you propose.

MR. HRUSKA: No. It is an alternative to the first proposal I just made.

THE COURT: It seemed to me that the first proposal was that the rights to cancel would have to be exercised vis-a-vis all networks.

MR. HRUSKA: That's right.

THE COURT: Now, that doesn't deal with the question of when it has to be done.

MR. HRUSKA: I know that, but the matter of when will, I think, indicate to your Honor an alternative way of dealing with the problem which is, in effect, our alternative proposal.

THE COURT: Let me hear that. I don't quite understand why that would be an alternative, but let me hear it.

MR. HRUSKA: We would propose that, in this interval period between the date of the decision and the effective date of the per use system, notices go out to copyright proprietors perhaps on the kind of form that we discussed during the day which I handed up to your Honor.

Now, that form, as I mentioned at that time has a space provided for the exercise of the cancellation right and a space provided for the filling in of the name of an agent or a representative, the copyright proprietor who has been set up to deal directly for the music.

Now, I think, your Honor, that if those notices come in, and we find massive withdrawals of music from the

copyright--from the per use licenses by people who have not filled in the name of somebody who is set up to deal, in view of the fact that the only ~~valid~~ business reason for pulling music from the per use license is to obtain a higher price, and in view of the fact that it is so easy to do that if they fill out the name of somebody who is set up to deal for the right, that that would be evidence in and of itself of an unwillingness to deal.

THE COURT: Hold it; hold it. You have lost me a long time ago.

I asked you only what CBS proposes; not for a justification of it; not a rationalization of it or anything; just the material on which to base a hypothetical question to the witness.

Now, one item that I got was that CBS proposes that any person who has the right to cancel, which would mean any proprietor, must exercise that right vis-a-vis all the networks.

Second, that a reasonable time period be given and required with regard to that act.

Now, may I have, without any attempt to rationalize or justify, whatever elements of CBS proposal we want to include in the hypothetical question to this witness?

MR. HRUSKA: What I am saying now, your Honor, is

as an alternative--

THE COURT: Tell me what the alternative is.

MR. HRUSKA: As an alternative to dealing with the problem by conditioning the cancellation right on cancelling as to all three television networks.

THE COURT: What is the alternative?

MR. HRUSKA: The alternative is not doing that and relying on the evidence that develops in the period of time between the date of the decision and the setting up of the per use system.

THE COURT: Are we going to be questioning the witness on that at the moment?

MR. HRUSKA: The only question I was going to put to the witness on this, which I think, as things have evolved today, is something I must answer myself, and that is, to make the point that CBS does not regard this rule against selective or discriminatory cancellations, if you will, to be, in fact, an essential feature of the per use system. In other words, CBS, I represent to your Honor, would accept per use relief in this case without that feature.

THE COURT: Well, that is a very important statement. We have to know positively whether it is a condition or it isn't a condition.

MR. HRUSKA: And I simply am suggesting to your Honor that the reason that my client would accept per use relief without this feature is, despite the concern expressed by Mr. Sipes--

THE COURT: I am going to intervene now because I don't think this is the time to explain to me why they will do this or that, as I have tried to bring the proceedings back all day long to questioning the witness.

The only reason I have insisted on CBS stating what its proposal is, to posit that as a hypothetical on the basis of which to answer a question, but now I think it is vital for us to know where CBS is proposing that any--whether it is proposing that any cancellation be industry-wide, if you want to call it that, or network--not network. ~~It is~~ Is it TV network, industry-wide or not.

Now, it is a terribly important point in the case, as we all agreed this morning, and I am unclear, from what you have said, whether it is or is not a condition of your proposal.

MR. HRUSKA: To make it crystal clear, it is not a condition of the basic per use proposal; it is simply a provision which we would urge at the relief stage of the case, I believe.

However, there is no question about it. CBS will

accept the installation of a per use system which does not have a rule which would prohibit copyright proprietors from cancelling ASCAP and BMI's organization to license CTN under the per use license without also cancelling as to the other television networks.

THE COURT: All right. Now, there are two aspects to the present--what should I call it?--leg of the case that we are embarked upon: One is what--or there are two questions that relate to it: One is what will CBS accept, so to speak? That is what you just said. The other is what is CBS proposing? Because I and your opponents--I have to judge; they have to zero in on it--whatever CBS is proposing. The feasibility of your plan is, or will be at issue in this leg of the trial, and I have to know, not only what CBS will accept but what CBS is proposing, and I am not sure, from the way you put it, whether they are the same thing or not.

MR. HRUSKA: May I say this, your Honor: I think that what the feasibility issue in the case really comes down to is, is there some form of per use license system which will be more competitive than the present system and which will work?

THE COURT: Well, let's assume that. Whatever you describe the feasibility question as being, I have to apply the test of feasibility to a given entity.

MR. HRUSKA: Right.

THE COURT: And I have to know what the entity is.

MR. HRUSKA: But then, your Honor, don't we come down to--I think we do. It is a rhetorical question--don't we come down to the least common denominator? In other words, as long as there is a form of per use license which will work, which will be more competitive than the present system, and CBS is urging that as an alternative, at least one of the forms of per use license that is possible, and every one of these features could have many variations which I think has to be ironed out at the relief stage of the case; isn't that all that need be shown here on the liability side so that when we get into the relief stages of the case, then we can hammer out the details, then we can argue whether it is really necessary for there to be a provision which prohibits a copyright proprietor from cancelling as to CBS if he doesn't cancel as to NBC or ABC?

THE COURT: I don't think that solves my problem.

My problem is that I have a target to shoot at, and I have to know where the target is.

MR. HRUSKA: Your Honor, let me say, then, if that is so, if your Honor feels that at this stage of the case we have to make an election as to whether or not this rule against selective cancellations ought to be or ought

not to be part of the par use system, then I ~~them~~ would be forced to say that we will elect against it, that we will drop it, but I don't really think, your Honor, that that is fair because I think at the relief stage of the case that is really the place to get into this.

THE COURT: I am not trying to be unfair. I don't know that fairness comes into it.

I will suggest this: I think this is quite an important matter. It is ten past four in the afternoon. We are close to the end of the day. I would suggest that three lead counsel and Mr. Finkelstein, if Mr. Topkis wants him, meet with me in the robing room so we can discuss this particular issue further, and we will adjourn the testimony for the day and commence or resume ~~them~~ it tomorrow.

(Adjourned to May 2, 1973 at 10 o'clock a.m.)

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

MORRIS I. KLIGMAN
SIMON A. LUBOW
LUKE J. OWENS
IRVING WOHL
MICHAEL MARDINEY
EDWARD A. BARRON
JOHN H. KNUPPEL
GEORGE WOLF
JACK GREENBERG
MURRAY PADGUG
ARTHUR RUSSELL
MORT COHEN
MURRAY DEUTSCH
JULIAN WOLF
EDWARD E. ODETTE
ROBERT G. MAIRE

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TASCIONE
EUGENE A. LEVINE
GARY WEISSBROT
JOHN BENOIT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

Mark Belnick, Esq.
Paul, Weiss, Rifkind, Wharton & Garrison

Robert Sondak, Esq.
Cravath, Swaine & Moore

Craig Bowman, Esq.
Hughes, Hubbard & Reed, Esqs.

Date	Page	Line(s)	Error	Change To
May 1	4	2	or	of
	4	7	drive	deprive
	4	15	program	per-program
	4	18-19	remove existing quotations	place around "Draconian"
	6	10	a	delete "a"
	6	11	CTN	CTN"
	6	12	I understand the	--- under the
	6	19	initials	issues
	7	2	state	stage
	7	2	couse	course
	7	16-17	us	as

ORRIS I. KLIGMAN
MON A. LUBOW
KE J. OWENS
VING WOHL
CHAEL MARDINEY
WARD A. BARRON
HN H. KNUPPEL
ORGE WOLF
CK GREENBERG
URRAY PADGUG
THUR RUSSELL
RT COHEN
URRAY DEUTSCH
LIAN WOLF
WARD E. ODETTE
BERT G. MAIRE

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TASCIONE
EUGENE A. LEVINE
GARY WEISSBROT
JOHN BENOIT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

Date	Page	Line(s)	Error	Change To
May 1	9	25	the decor	at the core
	13	5	from	is
	16	17	with performers	for performers
	17	4	packaging	package
	18	10	produces nighttime	produces a nighttime
	20	15	of	or
	23	13	theright	the right
	23	23	this is going	this is not going
	26	10	in which	but rather
	26	25	a chemist	an economist
	27	18	of of	of, or
	30	9	hafe	have
	30	22	whether	whenever
	30	22	procedure	producer
	30	23	and	in
	31	7	offers	offs

MORRIS I. KLIGMAN
SIMON A. LUBOW
LUKE J. OWENS
IRVING WOHL
MICHAEL MARDINEY
EDWARD A. BARRON
JOHN H. KNUPPEL
GEORGE WOLF
JACK GREENBERG
MURRAY PADGUG
ARTHUR RUSSELL
MORT COHEN
MURRAY DEUTSCH
JULIAN WOLF
EDWARD E. ODETTE
ROBERT G. MAIRE

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TASCIONE
EUGENE A. LEVINE
GARY WEISSBROT
JOHN BENOIT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

127- 3

Date	Page	Line(s)	Error	Change To
May 1	31	14	willgo	will go
	31	25	Harry	Herman
	32a	5	Mr. Appel and	Mr. Appel,
	13	5	from	is
	32	18-19	must advise you	must have advised
	33-57	1	Sypes	Sipes
	34	2	higher than year three	higher than year two
	34	11	hasn't	has
	34	12	out yet.	out.
	34	18	Kramer	Cramer
	34	23	and	And
	35	8	Sypes	Sipes
	36	2,6,8, 23	Kramer	Cramer
	37	2,3	Kramer	Cramer
	37	5	had	have
	38	4,14,18	Sypes	Sipes

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

MORRIS I KLIGMAN
SIMON A LUBOW
LUKE J. OWENS
IRVING WOHL
MICHAEL MAROINEY
EDWARD A. BARRON
JOHN H KNUPPEL
GEORGE W...
JACK GRE...
MURRAY PA...
ARTHUR RUSSELL
HORT COHEN
MURRAY DEUTSCH
JULIAN WOLF
EDWARD E ODETTE
ROBERT G. MAIRE

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TASCIONE
EUGENE A LEVINE
GARY WEISSBROT
JOHN BENOIT

C A MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S BUTTNER

Date	Page	Line(s)	Error	Change To
May 1	39	15	Sypes	Sipes
	40	3,14	Sypes	Sipes
	40	22		delete "it isn't"
	41	10	use	views
	41	10	Sypes	Sipes
	42	6	hwo	how
	42	8,15	Sypes	Sipes
	42	9	owrk	work
	43	13-20	pulls, pull	polls, pool
	43	18	-icense	license
	44	20,22	Sypes,Sypes'	Sipes, Sipes's
	45	8	pull	pool
	45	22	Sypes	Sipes
	46	9	of	under
	46	23	Sypes	Sipes
	48	19	Sypes	Sipes
	48	21	pull	pool

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

[illegible] I. KLIGMAN
[illegible] A. LUBOW
[illegible] J. OWENS
[illegible] WOHL
MICHAEL MARDINEY
EDWARD A. BARRON
JOHN H. KNUPPEL
GEORGE WOLF
JACK GREENBERG
MURRAY PADGUG
ARTHUR RUSSELL
MORT COHEN
MURRAY DEUTSCH
JULIAN WOLF
EDWARD E. ODETTE
ROBERT O. MAIRE

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TASCIONE
EUGENE A. LEVINE
GARY WEISSBROT
JOHN BENOIT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

Date	Page	Line(s)	Error	Change To
May 1	50	10	s-ould	should
	50	17	Sypes	Sipes
	52	8	Sypes	Sipes
	52	20	[illegible]duce	production
	52	25	cans	can
	53	3	the use	the per-use
	54	22	clostly	costly
	55	18	new	news
	56	2,7	Sypes	Sipes
	58	24	think	thank
	59	12	flush	flesh
	60	8	peraphs	perhaps
	62	4	86	860
	63	16	this form	this in the form
	66	10	performer	performers
	67	4	all	will
	68	7	is out	is it out
	69	12	copyright	copyright owner

MORRIS I KLIGMAN
SIMON A LUBOW
LUKE J OWENS
IRVING WOHL
MICHAEL MARDINEY
EDWARD A BARRON
JOHN H KNUPPEL
GEORGE WOLF
JACK GREENBERG
MURRAY PADDUG
ARTHUR RUSSELL
MORT COHEN
MURRAY DEUTSCH
JULIAN WOLF
EDWARD E ODETTE
ROBERT G MAIRE

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TASCIONE
EUGENE A LEVINE
GARY WEISSBROT
JOHN BENOIT

C A MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S BUTTNER

Date	Page	Line(s)	Error	Change To
May 1	69	24	butI	but I
	70	12	price has provided,	price, has provided
	70	23	object	objection
	71	16	yorn	your
	73	19	made	used
	75	10		delete "besides"
	77	14	networds	networks
	78	24	enjoinings	injunctions
	78	25	any	all
	80	3	Sypes	Sipes
	80-112	top of page	Sypes	Sipes
	83	13,21	Sypes	Sipes
	83	23	on the CTN program	on CTN programs
	84	5	Sypes	Sipes
	85	22	Sypes	Sipes
	86	14	an	as
	88	2,24	Sypes	Sipes
		14,25		Sipes

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

MORRIS I. KLIGMAN
SIMON A. LUBOW
LUKE J. OWENS
IRVING WOHL
MICHAEL MARDINEY
EDWARD A. BARRON
JOHN H. KNUPPEL
GEORGE WOLF
JACK GREENBERG
MURRAY PADGUG
ARTHUR RUSSELL
MORT COHEN
MURRAY DEUTSCH
JULIAN WOLF
EDWARD E. ODETTE
ROBERT G. MAIRE

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TASCIONE
EUGENE A. LEVINE
GARY WEISSBROT
JOHN BENDIT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

Date	Page	Line(s)	Error	Change To
May 1	90	25		add "in the can problem" at end
	92	19	Sypes	Sipes
	96	4	Sypes	Sipes
	97	16,20	Sypes	Sipes
	102	14	finally	finding
	104	11	Sypes	Sipes
	105	6	something he	something you
	105	11	4078	4087
	105	3,22	Sypes	Sipes
	106	4	parallel	paralegal
	106	9,12,24	Sypes	Sipes
	107	19	Syper	Sipes
	108	3	Sypes	Sipes
	108	22	asking here for	asking for here
	109	8	Sypes	Sipes
	110	8,10	Sypes	Sipes
	111	18	Sypes	Sipes
	111	3	considered	considered how

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

MORRIS I. KLIGMAN
SIMON A. LUBOW
LUKE J. OWENS
IRVING WOHL
MICHAEL MARDINEY
EDWARD A. BARRON
JOHN H. KNUPPEL
GEORGE WOLF
JACK GREENBERG
MURRAY PADGUG
ARTHUR RUSSELL
MORT COHEN
MURRAY DEUTSCH
JULIAN WOLF
EDWARD E. ODETTE
ROBERT G. MAIRE

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TASCIONE
EUGENE A. LEVINE
GARY WEISSBROT
JOHN BENOIT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

Date	Page	Line(s)	Error	Change To
May 1	114	7	bedause	because
	114	19	and disadvan-taged	disadvantage
	114	13	that	that?
	115	16	on summary motions	on the sum-mary judgment motion
	117	2	Iam	I am
	119	24	ton	to
	121	3	rights	right
	122	4	valie	valid
	124	16	It is	Is it
	125	8	let	leg
	126	5	rhetirical	rhetorical
	126	14	stages	stage
	127	2	thenI	then I
	127	15	resume them	resume it

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OFFICE COPY ENTERED

COLUMBIA BROADCASTING SYSTEM	Before: HON. MORRIS E. LASKER, District Judge
vs.	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.	69 CIVIL 5740

New York, May 2, 1973

STENOGRAPHER'S MINUTES

SOUTHERN DISTRICT COURT REPORTERS

COLUMBIA BROADCASTING SYSTEM

v.

69 Civ. 5740

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.

May 2, 1973
9:45 a.m.

Also Appearing for Plaintiff:

JOHN D. APPEL, Esq.,
-and-
RICHARD G. GREEN, Esq.

(In the robing room.)

THE COURT: With regard to documentary evidence, I think everybody got excessively rigid or excessively informal, as the case may be, yesterday. And therefore I am imposing the following rule:

1. A party intending to introduce a document in evidence shall, except where not practicable, advise the other parties of ~~the~~ their intention to introduce the document no later than the departure from court after the trial session the day before such document is to be introduced.

Any party who intends to object to the competency or accuracy of the proposed exhibit or authenticity after examination of the document proper shall advise the attorney for the proposing party of the proposed objection and the grounds for it so that the proffering attorney will be in

a position to have available a witness prepared to testify to the competency, accuracy or authenticity of the document, as the case may be.

2. The parties are urged to stipulate at least as to the authenticity of documentary exhibits except where there is a good-faith basis for doubting that authenticity, in which case the objecting party shall advise the Court what the basis of the doubt is.

Now I am open to proposed modifications, but unless they are important I would like to go this route.

MR. TOPKIS: Just a question. You say that you want us, if we do propose to object, to advise each other?

THE COURT: Yes.

MR. TOPKIS: That afternoon, that is to say immediately?

THE COURT: Yes.

MR. TOPKIS: Fine.

THE COURT: I think so, unless there is something terribly difficult or complicated about it.

(Discussion off the record.)

(In open court.)

THE COURT: Gentlemen and Miss Kearse, it has been suggested to me that this morning we try to improve

audibility by putting the witness in the jury box in the corner here. The reporters have suggested that that may be a little easier to hear. And so we will do that when Mr. Sipes comes.

Mr. Sipes, will you resume the stand, please?

D O N A L D S I P E S, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. HRUSKA:

Q Yesterday, Mr. Sipes, you gave testimony about your judgment concerning the impact on the CBS Television Network of a cancellation of the ASCAP and BMI licenses. One of the facts you mentioned in that connection was the shortness of the schedules under which television programs are produced.

Have you considered whether the licensing of music performance rights could be accomplished with sufficient speed under the per use system as to accommodate those production schedules?

MR. TOPKIS: Excuse me, your Honor, before Mr. Sipes responds. Would it be possible for Mr. Hruska to examine from over there? We can't see the witness.

THE COURT: We will have to see that you do see the witness. It would be possible from my point of view.

MR. HRUSKA: Would it be possible for Mr. Topkis

to change seats with Mr. Gitter so that he can see the witness?

(Discussion off the record.)

THE COURT: Mr. Topkis, can you see him now?

MR. TOPKIS: Absolutely fine, your Honor.

THE COURT: Good.

I suppose the question should be read back to the witness.

(Question read.)

A Yes, I have.

Q What is your judgment?

A I think under ~~th e~~ the per use system that it could be accomplished basically for the following reasons: We would have a reservoir in the per use system. The compositions that we would be talking about in the program would either be in that reservoir, at which point, of course, the producer has no problem -- he has the reservoir to use or he could try to directly license that music; at least the reservoir is there -- or the music can have been pulled.

In other words, it is out of the reservoir.

In that instance, the man has pulled because he thinks he can get more money than the per use system in the reservoir provides, and he has given us the name and phone

number of the man who is going to deal for him, who is ready to make a deal for him. That name is given to the producer and the producer can reach that man and make a deal.

Q You also testified yesterday, to your belief, that an attempt by the CBS Television Network to by-pass ASCAP and BMI would put CBS at a serious competitive disadvantage. Have you considered, Mr. Sipes, the following type of project as a means for paving the way to such a by-pass? What I mean is this:

One, seeking to amass a reservoir of music performance rights by purchasing options from music publishers, that is, options to use the music in their catalogs at stipulated fees, perhaps even per use fees; and two, if you option enough music, exercising the option and then cancelling your ASCAP-BMI license?

MR. TOPKIS: I object to the question on the ground that it is leading. If the witness is asked what he considered, I would have no objection. But to put a speech in his mouth and then ask him if he has considered it seems to me inappropriate.

THE COURT. I think we have a little trouble with this word, "considered," because in the long run I think Mr. Hruska is trying to get Mr. Sipes' opinions as to the feasibility of these things, and under those circumstances

there is no reason why he can't give him the precise state of facts that he wants an opinion on.

But I think from here on in you should say, "Do you have an opinion with regard to a system which" -- and we won't have any misunderstanding.

Am I correct in understanding your approach?

MR. HRUSKA: Exactly, precisely, your Honor.

THE COURT: Mr. Sipes, do you remember what Mr. Hruska asked you?

THE WITNESS: Yes.

THE COURT: Do you have an opinion with regard to the workability of such proposal?

THE WITNESS: Yes. My opinion is that that is not a workable situation.

Q Would you give us the basis for your opinion in that regard?

A Well, under that situation I don't think that any significant publisher would make a deal with me on that kind of basis unless I could do better by him than he is going to do under the system he is operating under now. So I have to really put up a good hunk of money to make this attractive to him.

At the same time, I don't feel that I could amass the reservoir that I need to live with. Therefore,

every option deal I make with any publisher, if I could make one with him, is to me money thrown out because the options become meaningless to me because I can't amass the reservoir I need anyway.

Q ~~Who~~ Why do you feel that you would have to pay more to these publishers?

A Well, I feel I would have to entice him out of the system he is in.

MR. HRUSKA: All right.

Your Honor, I would like to hand up to the Court and offer in evidence, Plaintiff's Exhibit 231, which is the ASCAP local station per program television license agreement form.

THE COURT: I have it in two forms. One seems to be more original than the other.

MR. HRUSKA: I think we can offer that in evidence right now without any further discussion.

THE COURT: Any objection?

MR. TOPKIS: No objection.

MISS KEARSE: No objection.

THE COURT: Received in evidence.

Plaintiff's Exhibit 231, which is entitled "ASCAP Local Station Per Program Television License Agreement."

(Plaintiff's Exhibit 231 received in evidence.)

xx

Q I would like you to look, Mr. Sipes, at two particular provisions of this form of license agreement. One appears on page 5 and it is Paragraph 4A(1), and the other one appears on page 9 and it is Paragraph 4I.

MR. HRUSKA: Your Honor, I could read these paragraphs in or I could simply hand this to the reporter and have him copy those two paragraphs in the record and perhaps we can all read them for a moment, rather than my reading out loud.

THE COURT: Then, let's do that. Do you want to ask Mr. Sipes some questions?

MR. HRUSKA: Yes.

"4. A. In consideration of the license herein granted, Licensee agrees to pay to Society for each calendar month during each contract year during the term hereof the following:

"(1) Commercial Fee: (a) 9% of its 'net receipts from sponsors after deductions ' on local commercial television programs of which any or all of the musical content shall include, in whole or in part, any musical composition licensed hereunder except those programs consisting of films produced originally for exhibit in motion picture theatres and first distributed to and

exhibited in such theates, and which make only incidental use in such films of any of the compositions licensed hereunder as provided in subdivision '(b)' of this Sub-paragraph '4A)1)'

"(b) 4% of its 'net receipts from sponsors after deductions' on local commercial television programs consisting of films produced originally for exhibition in motion picture theatres and first distributed to and exhibited in such theatres, and which make only incidental use in such films of any of the compositions licensed hereunder in the following manner: as instrumental bridge, cue or background music only."

"I. No payment shall be required hereunder with respect to a local commercial or sustaining television program of Licensee presented by motion picture or by transcription if a license has been granted at the source to perform the musical compositions embodied in such motion picture or transcription on said program of Licensee by means of television broadcasting of such motion picture or such transcription by (a) Society, or (b) the composer(s), author(s) and publisher(s) of such musical compositions, and Licensee shall have given Society

notice in writing of such license at the source and the terms thereof (including the title of the motion picture, the name of the producer and the music cue sheet of such motion picture listing the composer(s), author(s) and publisher(s) of each musical composition embodied therein) at least seven days prior to Licensee's television broadcast of said program."

THE COURT: Have you read it?

THE WITNESS: Yes, sir.

THE COURT: All right, Mr. Hruska.

Q Mr. Sipes, I would like you to assume that the CBS Television Network held a program license from ~~ASCAP~~, let's say -- well, let's say both ASCAP and BMI -- that contained those two provisions, 4A(1) and 4I.

Do you have an opinion regarding the extent to which CTN could escape paying ASCAP or BMI the per program fee which, in this form, is 9 per cent of net receipts from sponsors after deduddions by meeting the provisions of Paragraph 4I?

MISS KEARSE: Your Honor, could we have the question read back, please?

THE COURT: Yes.

(Record read.)

MISS KEARSE: Objection, your Honor. It calls for a legal conclusion.

MR. TOPKIS: Well, I would put a further objection, your Honor, and that is that if I understand the question, it would mean to what extent can CBS produce cue sheets or something like that.

THE COURT: Well, you have a more thorough knowledge of the industry than I do, so I don't have any idea whether it means that or not.

I am puzzled by the extent to which this calls for a factual answer, rather than a legal conclusion.

Mr. Hruska, what is it you are trying to establish here?

MR. HRUSKA: Yes. I think it is basically factual but what I am seeking from the witness is an opinion as to whether given the conditions which he has just read now in paragraph 4I, which is a provision which says in effect that you can escape paying the 9 per cent per program fee if --

THE COURT: 4I?

MR. HRUSKA: Yes.

MISS KEARSE: We have ~~only~~ had this provision read into evidence. I think there is a pending question and pending objection and I don't think Mr. Hruska should

be allowed to characterize and make speeches about it.

MR. HRUSKA: I am attempting to answer your Honor's question.

THE COURT: Overruled, Miss Kearse, but we have some documentary evidence here.

Now, isn't it possible to ask the witness an opinion in language which I can understand?

Frankly, I really don't know what you are driving at here and it is me you are trying to educate. "Are you" Are you asking whether if CBS were to have a per program license which included these provisions, in Mr. Sipes' opinion they would operate in such a manner so that CBS would not have to pay the 9per cent fee called for under 4A(1)?

MR. HRUSKA: Well, that's pretty close.

Really what I am asking is to what extent, trying to operate "I," you would end up not having to pay the 9 per cent stipulated in 4A.

THE COURT: Let me ask this question:

If, as you assume, that CTN had a per program license from ASCAP and BMI, which included these two clauses, would you give me your opinion as to how it would operate?

THE WITNESS: Well, I think it would operate this way, your Honor:

That, by and large, it would not be able to use the provisions of Paragraph I on page 9 to escape from paying the per program fee to ASCAP or BMI.

THE COURT: Why?

I am asking why in his opinion, Miss Kearse.

MISS KEARSE: Well, I want to move to strike the answer on the grounds that it gives legal conclusions.

THE COURT: Well, we will see whether it's a legal conclusion or it is not.

Mr. Sipes, why? On what is your opinion based?

THE WITNESS: Right. First of all, I would like to make the comment that I have some difficulty with the defintion of terms, what is meant by a motion picture and a transcription here, because most of the programming that we have on CTN, or much of the programming we have, are things made for television, half are comedies or dramatic shows or taped shows.

To me, motion picture can be defined to mean theatrical motion pictures which appear on television, as distinguished from what I have just said.

THE COURT: What are you assuming in giving your answer?

THE WITNESS: One, I would assume that the motion picture and transcriptions here do not cover the

typical films and taped shows that we have on the air, but I would take it even a step further, your Honor:

If it was assumed that it did, for the moment, I would still have grave difficulties.

THE COURT: Would you tell me what the difficulties are?

THE WITNESS: Yes, sir.

Under this system, I have to call -- the network has to call on the people involved with compositions on a program and then give seven days' notice to the Society that this has been done.

THE COURT: Are they people being --

THE WITNESS: Everybody who was involved in that composition, not just the copyright owner, I take it here.

THE COURT: Where do you find that?

THE WITNESS: It says the composer, authors and publishers of such musical compositions and --

THE COURT: Wait a minute, now.

I am reading this not necessarily for the first time but certainly not for a long time -- the first time in a long time. I am reading it perhaps hastily but it seems to me that the reference to those parties was merely to describe the source of a prior license.

Am I correct on that, Mr. Hruska?

MR. HRUSKA: I don't believe, your Honor, no. The provision, as I read it, is that payment provided for in the 4A is not required if the music on this defined group of programs has been cleared by the source, which means licensed.

THE COURT: Has been granted, yes, by --

MR. HRUSKA: By either the Society or the composers, authors and publishers of such musical compositions.

In other words, either by ASCAP, which I don't think has very much meaning in this provision, or directly by the composers, authors and publishers.

T3A

THE COURT: And you take that to mean -- I am now asking for a legal construction on the part of plaintiff's counsel, and I would like Mr. Topkis's statement as to whether ASCAP agrees -- that you have to secure both the permission of the composer and the author, as the case may be, and the publisher, isthat right?

MR. TOPKIS: I really don't know, your Honor.

THE COURT: Mr. Finkelstein, do you have a position on that?

MR. FINKELSTEIN: Your Honor, this was a contract negotiated with the broadcasters on one side and the ASCAP Committee consisting of writers and publishers on the other side. This is agreed language, for whatever it means, your Honor. I wouldn't want to try to interpret it now at this moment, unless directed to.

THE COURT: Never mind that. I understand it. Mr. Sipes construed it to mean that you have to get at least the composer's and the publisher's approval.

Right?

THE WITNESS: Right. If I can give an illustration of a program, maybe I can help out a little.

If you had a musical variety show, for instance, that had ten feature performances and five of them were ASCAP and five of them were BMI, you would have to

go after every single composer, author and publisher of every single one of the compositions and make a deal with all those people and then give seven days' notice thereafter that you've done that to the Society to clear the song.

THE COURT: In the case of a song, does an author refer to the lyricist?

THE WITNESS: Yes.

THE COURT: I see.

THE WITNESS: That is much too rough a proposition for us.

THE COURT: Right.

BY MR. HRUSKA:

Q Let's assume, then, Mr. Sipes, that this paragraph 4I was simply removed from your hypothetical per program license.

A 4I?

Q Right; and that the per program license that you got from each of ASCAP and BMI read in effect that you paid 9 per cent of the net receipts from sponsors after deductions --

THE COURT: In other words, going back to 4(H).

MR. HRUSKA: Right.

Q 9 per cent for each program in the case of the

ASCAP license, using any ASCAP music which had not been licensed directly from the copyright proprietor and the BMI license read the same way; in other words, no limitation as to movies, no requirement of getting all the composers, authors and publishers, and no seven days' notice.

Could you work with --

A I'm sorry. What do I have to get? What has to occur here? I'm sorry.

Q Take a program.

A Right.

Q If all the music used on that program, all the ASCAP music is licensed directly from the copyright proprietor, you need pay ASCAP no per program fee. If all the BMI music used on that program is licensed directly from the copyright proprietors of that music, you need pay BMI no per program fee. But if any ASCAP music used on the program is not licensed directly, then you must pay ASCAP the full per program fee, and the same thing would be true in the case of BMI music.

Do you have an opinion as to whether, under those circumstances, you could escape the payment of this per program fee or to what extent you could?

A Well, again I think my opinion is by and large

that I could not escape under that situation either.

Q Why is that?

A Well, again let's take an illustration, the same. I've got ten compositions in the variety show. Five are ASCAP and five are BMI.

If I clear four of the ASCAP and four of the BMI and I can't clear the fifth in either situation, then I've paid all the money for the four and four and I still have to pay the fee to ASCAP and BMI on top of that.

THE COURT: For a program.

THE WITNESS: For each program in which that occurs, your Honor.

Also I would have the problem -- I'm in an obstacle course, with hurdles. If I get the first composition, then I'm in for money for that first composition. The second guy knows that. The third and the fourth knows that. Each time it gets rougher and rougher for me because, if I don't make it to the end, I've got to pay the 9 per cent on top of whatever I've paid.

That would lead me to make a determination, I think, up front to pay my $2, pay me my 9 per cent and not get into that situation.

MISS KEARSE: Your Honor, I move to strike everything from "the second knows that" until the end of the

witness's answer.

THE COURT: Overruled.

Q Now continuing under the assumption, Mr. Sipes, that you have this form of per program license that we just described from ASCAP and BMI, do you have an opinion as to whether you could turn over the acquisition of performance rights, the job of doing that, to program packagers?

THE COURT: May I hear the question again, please?

(Question read.)

THE COURT: You mean if CTN had a straight per program license under this agreement?

MR. HRUSKA: Yes, your Honor.

A My opinion is that under those circumstances I couldn't turn it over to packagers.

Q Why not?

A Well, let's take a situation, a packager who is in a situation we just talked about, for instance. I would have to, first of all, give him 18 per cent so that he can clear both ASCAP and BMI, if necessary. 18 per cent is a whopping amount of money as far as I am concerned. It is just too much.

If I gave him 9 per cent, which I consider to be too much anyway, but if I give him 9 per cent, in a

way what I'm doing in that kind of situation is making him deal with perhaps only one Society, which I don't want to do, because he gets to that point where he has to pay 9 per cent somewhere because he has that same obstacle course that I've got.

In other words, he has now the ten compositions to clear. Whatever money he pays is gone money if he can't get that last composition. Therefore he's got my problem all over again. So I don't think that makes any sense. I couldn't do that.

Q Suppose you were to negotiate a package fee which would contemplate a music budget of less than 9 per cent?

A Less than 9 per cent?

Q That's right.

A Well, in that situation the packager is in big trouble about music fees and I don't think he is going to want to do business with me.

MR. HRUSKA: I have no further questions of Mr. Sipes.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. TOPKIS:

Q Mr. Sipes, it is nice to see you again. We have met before.

Your deposition was taken in this action.

A Is that a question?

Q That is a question.

A Yes, it was.

Q And you there testified, as I recall it, that you couldn't suggest anyone at CBS who might know more about how a per use license would work than you.

MR. HRUSKA: Could we have page references, your Honor, on citations or references to the deposition?

MR. TOPKIS: Page 56.

Q (Continuing) Do you remember that question?

A It is pretty hard for me, Mr. Topkis, to remember everything in that deposition. As I remember, it was a rather lengthy deposition.

Q Actually only 150 or 60 pages. But you have read it recently, haven't you?

MR. HRUSKA: I object to the question. Now that I have seen the deposition, I don't really think that is a fair characterization of the testimony. The question on the deposition --

THE COURT: Let Mr. Topkis proceed. If you want to clarify it, do it on redirect, or if anything is read from the deposition you can read more.

Q Let's start again, Mr. Sipes. Can you suggest anyone at CBS who might know more about how a per use license would work than you?

A Not because --

THE COURT: No. Just answer the question yes or no.

A No.

Q Now, Mr. Sipes, before you came east in 1968 you had had no connection whatsoever with music licensing, isn't that right?

A That is right.

Q And you have never exchanged so much as a word with any writer, composer or lyricist about music licensing, have you?

A That is correct.

Q And you have never exchanged so much as a word with any publisher about music licensing, have you?

A That is correct.

Q And you have given no thought to the question of how music would enter and leave coverage of a per use license, have you?

A Would you repeat that?

(Question read.)

THE COURT: Do you understand the question?

THE WITNESS: Not really, your Honor.

THE COURT: Let's be sure that you understand Mr. Topkis' terminology before you try to answer.

Q You don't understand it, Mr. Sipes?

A I don't understand it. I would like you to clarify it, if you would.

THE COURT: Will you explain to the Court, too, what you mean by entering and leaving?

MR. TOPKIS: Certainly, your Honor.

Q My question is, have you given any personal thought and attention to the question of how there would be additions to and deletions from the list of compositions covered by the per use license?

A I think I testified yesterday that we considered the music operations department would designate the reservoir and that provision would be made for new music to enter into that reservoir.

Q But actually you don't know, yourself, how that would be done? Do you?

A How?

Q How that designation would be made.

A No, I don't think I'm an expert in that area, as to musical compositions and what you are talking about.

Q And you are not an expert in music licensing either, are you?

A In what kind of music licensing?

Q In how music is either licensed or copyrighted.

A Music is licensed to networks in a blanket license.

Q My question, sir, is: Do you claim to be an expert in how music is licensed or copyrighted?

A No, I don't.

Q And you have no background in the musical field, is that right?

A That is correct.

Q And you have no idea how long it takes to check the identity of the proprietor of a copyright if you wanted to, do you?

MR. BRUSKA: I will object to the form of the question. I don't understand it. Under what circumstances, "check"?

Q You wouldn't know where to look, would you, Mr. Sipes?

THE COURT: I will allow the question.

Can you answer it?

A Well, I think you could try to find out from the Library of Congress. But other than that, I'm not an expert in that area, either.

Q Very well. So you don't know how long it would take under any technique.

(Pause.)

THE COURT: Are we at a stand-off? I don't know if the witness knows you are asking a question.

A I am trying to think for a minute. I have had no experience, naturally.

MR. HRUSKA: I would like to object simply because I think the question is so vague, I don't know how it could be dealt with. There ought to be --

THE COURT: What it comes down to, gentlemen, on both sides, is we are trying to find out what this witness knows about how to find a composer or author.

Will you just tell me, Mr. Sipes, what you know?

MR. HRUSKA: I don't think that was the question, your Honor.

THE COURT: Am I wrong, Mr. Topkis?

MR. TOPKIS: No, you are not, your Honor. I will try again.

Q Mr. Sipes, do you have any idea from your personal knowledge about how much time is required to check on the

identity of the proprietor of a copy right of a particular musical composition?

THE COURT: I think that is a perfectly clear question.

Just tell me what your experience is.

A From my parsonal knowledge, I don't have that experience.

Q Fine.

Now, you have never attempted to negotiate performing rights for individual compositions for CTN, have you?

A No.

Q And no one else at CBS has ever made any such attempt, is that right?

A Not to my knowledge while we have been under a blanket license.

Q Not to your knowledge ever, whether under a blanket license or an interim arrangement or anything else.

A Not to my knowledge.

Q Now, sometime in 1968 or 1969, do I understand that you decided to explore alternatives to the blanket license or licenses that you held with ASCAP and BMI?

THE COURT: What date is that?

MR. TOPKIS: Sometime in '68 or '69.

THE COURT: All right.

A That is correct.

Q You made no feasibility study, did you?

A No.

Q And what you did was to discuss the subject to some people at CBS, is that right?

A That is correct.

Q And the only people with whom you discussed alternatives to the blanket license were Mr. Appel, Mr. Evans and Mr. Poklitar, is that right?

A As far as I can recollect.

Q And Mr. Appel is an attorney employed by CBS?

A That is correct.

Q And Mr.Evans at present, at least, is general counsel to CBS and then either general counsel or an attorney employed by CBS?

A That is correct.

Q And Mr. Poklitar is in the music rights division or something like that, is that right?

A Music operations division.

Q Music operations. He is not the head of that?

A No, he is not.

Q And what you did was have these conversations;

there was no other study made of alternatives, is that right?

A Not that I can recall, no.

Q Nobody ever put anything down on paper.

A When you say, "Nobody," not that I know of, Mr. Topkis.

Q Right.

THE COURT: Is it likely that you would know of it if there was something on paper?

THE WITNESS: I would think I would know about it, your Honor.

Q And you made no study as to whether a per program license would be economically feasible, did you?

A Not study? That is correct.

Q Nobody ever put pencil to paper to figure out the cost of a per program license.

A That is correct.

Q Nobody ever put pencil to paper to figure out the cost of direct licensing. By "direct licensing," I mean what you have been using the term, "by-pass licensing," to describe.

A That is correct, because we couldn't figure out how to do that. I must admit that to you. As far as direct licensing was concerned, there was no way to do that. Whether we were right or wrong, that's the way we felt about

Q And nobody ever put pencil to paper to figure out the cost of a per use license.

A The same. That is right.

Q And nobody even told you what a per use license might cost, is that right?

A What it might cost?

Q Yes, sir.

A Well, we felt that a per use license, if we got it, in the long run would cost us less. But that was a general observation.

Q Based on nothing more subtle than the thought that ~~compensation~~ is likely to produce low prices, is that right?

A Nothing more subtle than that.

Q Fine. Of your own knowledge, do you have any idea whether the per use license proposal that your counsel has outlined would be feasible or not?

A Of my own knowledge?

Q Yes.

A Well, again, what do you mean by "knowledge"? We haven't had a per use license. I don't know what you mean by of my own knowledge whether I know of that.

Q Do you claim to be sufficiently familiar with the details of music licensing and music creation and music use

to have an idea as to whether the per use system could be adopted?

A Mr. Topkis, I have knowledge in this industry as to how all other elements are bought. I felt that a per use system was workable. It works for all other elements and it should work for this one, too.

Q But you don't really, yourself, have any idea of how it would work other than your faith based on your experience with other --

A When you say, how it would work -- I'm sorry, I don't mean to break in.

Q I will try again.

You don't have any idea,except as based on your experience with purchasing other elements of programs, how a per use system would work, is that right?

A You mean other than based upon my knowledge of the business and in buying all other elements?

Q That is right.

A And my experience in the business? Well, I would have no idea how a per use system would work because it is not in operation, if that's an answer to your question. I take that to be an answer to your question.

Q The way that a per use arrangement would work, technically works, would depend on the expertise of someone

other than yourself, is that right?

A Of other people, I would think, not someone else.

Q Yes. Agreed.

Now, did I understand you to say yesterday that you would use something called a performing rights survey in putting together the list of compositions that you would like to see licensed under a per use system?

A I think I used the term, Performed Works Index.

Q Performed Works Index. All right, sir.

Have you ever seen a Performed Works Index?

A I once saw a volume of the Performed Works Index, yes.

Q One volume?

A Yes, sir.

Q Was it ASCAP or BMI?

A I think it was ASCAP. I say I think it was ASCAP.

Q Did you open it?

A Yes.

Q And do you remember what the contents of it ~~was~~ WERE approximately?

A Well, not really. There were lists of compositions. That's as basic as I can get, I think.

Q There was only one volume?

A No, I didn't say there was only one volume. I said I looked at one volume. There was more than one volume.

Q Do you remember how many?

A No, I don't.

Q According to your understanding of the per use system which your counsel outlined yesterday, how would new compositions come to be covered under the per use licensing?

THE COURT: By "new," you mean newly written?

MR. TOPKIS: Newly composed compositions, right.

A Well, I think it possible that as new compositions enter the ~~Performed~~ Works Index they could flow into the reservoir. That's one way. Again, as you say, I'm not a technician in the music business. By that I mean I don't know; I can't hum, you know. I'm not a technician.

Q We start off on equal footing.

A But I think that might be one possible way.

Q Actually, Mr. Sipes, wouldn't it be fair to say that you have no idea of how that might work, meaning no disrespect?

A Well, you may say you mean no disrespect, but I think I've given you one possible way for it to work.

Q Well, let me suggest to you that we can agree

quickly that that way won't work, because it takes time to print and bind books, doesn't it, and you wouldn't want to wait until a book had been printed and bound before you could look up a work in such a book, would you?

A I don't know. How long does it take to bind a book?

Q However long it takes, would you want to wait that long?

MR. HRUSKA: I object to that question. Perhaps the witness could be -- I don't want to run the risk of coaching the witness, but if the witness could be asked to step out for one moment, I think I could make plain, your Honor, that I do not think that this is a fair line of questioning.

MR. TOPKIS: I'm sorry. I didn't hear that.

THE COURT: The witness to step out?

MR. HRUSKA: I don't want to coach him. If he can step off the stand for one moment, I will state my objection.

THE COURT: All right, Mr. Sipes. Usually the witness goes in the witness room, but that has been taken over by someone. So just wait in the hall for a moment.

(The witness left the courtroom.)

MR. HRUSKA: I think probably everybody in this

courtroom knows that the ASCAP Index of Performed Works is maintained on magnetic tape, reels of computer magnetic tape, that it is updated constantly, that only occasionally is the information on those tapes printed in the form of bound volumes for books.

The information is there, it is current, it is updated on the ASCAP computer system. ASCAP has a process every time a new work --

THE COURT: I get your point. But I really don't think I am going to interfere with his line of questioning because I think what is at issue here is not just what is actually the case, but the degree of Mr. Sipe's knowledge about what is actually the case.

MR. HRUSKA: I know, but --

THE COURT: And if he is proceeding on a mistaken assumption in this particular situation, that is relevant, I think.

MR. TOPKIS: That is all I am offering it for.

MR. HRUSKA: The question is suggesting to Mr. Sipes a false fact. They are suggesting to Mr. Sipes that the only the Index of Performed Works --

THE COURT: I am aware of what you are saying. But what I am saying is relevant is that what Mr. Topkis is bringing out is that Mr. Sipes doesn't know what you

just told me, among other things, and this is one way of showing the limits of his understanding.

I am not suggesting that feasibility depends on Mr. Sipe's understanding.

MR. HRUSKA: I understand that, your Honor.

THE COURT: All right. Will you recall Mr. Sipes?

(The witness returned to the courtroom and resumed the stand.)

THE COURT: I guess the first question to Mr. Sipes should be: Did you hear what we were talking about?

THE WITNESS: No, sir.

MR. TOPKIS: Mr. Reporter -- might I inquire, your Honor, was there a question pending? I think there was.

THE COURT: You were discussing a question of how long it would take to prepare a book.

MR. TOPKIS: Right.

Q My question is this, Mr. Sipes: However long it would take to print and bind a book, would you be willing to wait that long before you played a composition on CTN?

A I don't know, Mr. Topkis. I couldn't answer that question.

THE COURT: Mr. Sipes, do you know of any other way

that CBS or yourself could secure the information contained in the books we have been talking about than from the books themselves?

THE WITNESS: I think I would have to think about that, your Honor. I couldn't tell you offhand.

THE COURT: All right.

BY MR. TOPKIS:

Q As a matter of fact, do you know what this Performed Works Index is an index of?

A It is an index of compositions that have been played on the air.

Q If I were to suggest to you that it is an index of compositions which have turned up on the ASCAP survey of performances on radio and television, would that strike you as more accurate?

A Yes, I think that would be more accurate.

Q And do you have any idea how long it takes between the time that a composition is played on the air and the time that the appropriate notation of that fact is made in the archives of ASCAP?

A I cannot answer that, no.

Q Would it surprise you to have me suggest that it is approximately six months?

A I would take your word for it. I don't know.

Q Would you be willing to wait six months from the time a composition was first broadcast on the air before CTN was free to broadcast it?

A Perhaps. But also maybe there is another way of having that happen, Mr. Topkis.

Q Agreed.

A As I said to you before, I'm not the technician and I don't have the background, as we both agreed, in the technical workings of the music business. And perhaps there are other ways to solve these ~~problems~~ problems. I don't know.

Q You don't know, one way or the other, is that right?

A That is correct.

Q Okay.

Mr. Poklitar is the man who would be relied on at CBS to determine how many compositions should be in a designated repertory under the per use license, is that right?

A Well, I think he would be one of the gentlemen. I think I testified that perhaps the music operations department might hire outside consultants, also.

Q In any event, nobody at CBS to date has tried to designate a repertory for use under a per use system,

isn't that right?

A As far as I know, no.

Q Now, you testified about possible licensing in a per program license situation or a direct licensing situation of music for variety shows. Do you remember that testimony this morning and yesterday?

A I'm sorry. You confuse me.

(Question read.)

A There are two different situations.

MR. HRUSKA: I will object to the form of the question. I don't understand it.

MR. TOPKIS: It is preliminary, of course.

THE COURT: Do you understand what Mr. Topkis is asking you about?

THE WITNESS: Did I testify? I'm sorry. May I have it again?

MR. TOPKIS: I will do it again, your Honor. It is simpler, perhaps.

Q You have testified here about possible arrangements under a per program license for licensing individual compositions, right?

A Right.

Q And specifically for variety shows, right?

A That was the illustration I used, yes.

Q Right. Do you have any idea how much lead time would be required for licensing music for variety shows under a per program license?

A What do you mean by "lead time"?

Q Time going back from the taping of the program to the time when you set out to secure the performance rights.

A There, again, I think it would depend on the particular program. Maybe particular producers would have more specific answers for each kind of program than I would have.

Q All right. To your knowledge, does CTN today check on whether the music it broadcasts has been licensed by ASCAP, BMI or SESAC?

A Does it check?

Q Yes, sir.

A To see whether it falls under the license?

Q Yes.

A That's what we have the music clearance department for.

Q And are you sure that they do that? Or don't you know?

A Right at this moment I must say I don't know.

Q Do you know anything, Mr. Sipes, about practices in other countries around the world with reference to performing rights licenses?

A No.

Q And you don't know whether the per use proposal that CBS makes here is in use anywhere else in the world?

A No, I do not.

Q Now, under the per use system that CBS proposes, you haven't worked out in your own mind how the right of an ASCAP member to withdraw his compositions would work, have you?

A Have I worked out in my own mind how it would work?

Q That's right, sir, yes.

A I think I gave testimony that he would have the rights to withdraw, that he would give us notice of that withdrawal with relevant information.

Q But as to how much notice and what information would be relevant you haven't reached any conclusion on such details, have you?

A Well, I think those details can be refined.

Q I would agree with you.

Now, you talk about direct negotiations in a per use world. That is to say, we saw a form -- could I

see that? -- yesterday, your counsel showed it to you, you remember. It was Exhibit -- Plaintiff's Exhibit 860, a notice form.

Do you remember that?

A Yes, I think I remember it, if that's the thing I looked at.

Q And on the second page of it, if I may approach you with it, and I will be glad to show you the document, on the second page you will see, I think, Mr. Sipes, what might be called an invitation to the withdrawing member to state the terms and conditions on which he would be willing to license directly.

Do you see that?

A Yes.

Q Let me ask you this, sir:

In such direct negotiations, you would expect that the price that a copyright proprietor might ask would vary with the use that would be made of the composition, wouldn't you?

A I think that could be, yes.

Q Whether theme or background or featured use?

A Yes.

Q And if a featured use, you would think that it might well vary with whoever was going to perform it,

whether it be Marlene Dietrich or Sadie Glutz?

A Well, we didn't know much about Sadie Glutz.

Q I'll be glad to arrange an introduction if you will introduce me to Marlene Dietrich. Do you want to make a deal on it?

Could I have the question again?

(Record read.)

THE COURT: Do you believe there would be a variation in the price depending on who performed the feature?

THE WITNESS: I think that could only be learned over the course of time, your Honor, in the market place.

Q Well, have you ever heard of the licensing of synchronization rights for use on television?

A Yes.

Q Do you know how it is done?

A I know that a telephone call is made and a deal is made on the phone.

Q Do you know to whom the telephone call is typically made?

A Typically to the Harry Fox Agency.

Q Who makes the call?

A Somebody hired by the producer of a show or the producer himself, depending upon the internal workings

of that outfit.

Q So the producer of the variety show will call the Harry Fox Agency and say, "I want synchronization rights to perform" a certain song?

A Right.

Q And it is your understanding that the Harry Fox Agency will then call the publisher or someone else interested in the copyright and get a quote, right?

A Yes. I don't know how Harry Fox operates, how the agency operates, but that is basically it.

Q Have you heard that a publisher will vary his price depending on who is going to perform the composition?

A Yes, I've heard that and I've also heard that if it's too high, they won't take it. So, therefore, it depends on what works out in the market place.

Q Have you ever heard that a publisher will vary his price depending on whether the use is an on-screen or off-screen use?

A Again, you are getting into something that's been worked out over the course of time, Mr. Topkis. I mean, if Sadie Glutz and Marlene Dietrich get the same amount of money, it may be for reasons in the market place. If Marlene Dietrich gets more money than Sadie Glutz, that's something for the market place to work out

for us.

Q By the market place working it out, you would mean that the person bringing the product into the market -- that is, the person bringing the composition into the market -- would have his own ideas on such subjects and they would be met by the ideas of the person he was negotiating with, is that right?

A Okay.

Q And my question to you is whether you would expect that the publisher or other person interested in the copyright offering it for use would be interested in the question of whether it would be a full production number or a few bars for the broadcast?

A That could be, too.

Q And you would expect also that his view as to a proper price might depend on whether it was to be a one-time use or an on-going use on many episodes or programs, right?

A That could be, also.

Q And you would expect, also, that his price might vary depending on the number of stations in the network that would actually carry the program, isn't that right?

A Well, these things are all variables. They may or may not be taken into consideration, Mr. Topkis.

Q Agreed.

Now, the producer won't know a lot of these variables until shortly before taping, isn't that right, when he has got the program all set up in his mind?

A Well, again, you can assume that or not. I mean what variables at what point in time.

Q But it is your idea that an appropriate way to proceed would be for the copyright proprietor, as set out on Page 2 of this notice form, Plaintiff's Exhibit 860, to furnish all of the information that would be required for any such negotiations?

A No, that's not true because all he has to do is put the name and phone number -- he doesn't have to fill out the second page, as far as my reading of it goes. He can put in the name and phone number of the man who is going to deal for him, and that agent or broker or whatever term you want to use, negotiator,can negotiate with the producer on the terms that the copyright owner wants. He doesn't have to fill out the second page and give it to us. That's there if he wants to put it in.

Q Suppose a lot of copyright proprietors didn't fill out the second page.

Would you think that they were acting improperly?

A Didn't fill out the second page but gave us the

names of people that dealt with them and when we called the people and talked to them, we were able to make dealings with them on some kind of reasonable basis.

Q Well, I don't know. Suppose I ask my question and then you ask yours.

A Well, I can't really answer yours, unless I know what I am answering.

Q Let me ask you this: Suppose that a significant number of members of ASCAP, let us say, suppose the Cole Porter Estate and Richard Rodgers and Irving Berlin and Frank Loesser's Estate a l filled out your notice forms, left Page 2 blank and on Page 1 designated a man named Herman Finkelstein whose address is 1 Lincoln Plaza, New York City, would you think that your per use system would be wholly workable?

A I think I would have to talk to my lawyers.

Q That is what you did before you began this lawsuit.

A Is that a question?

THE COURT: Mr. Topkis, I suggest that we take a short recess at this time.

(Recess.)

Q Mr. Sipes, you spent the recess in that room back there?

A What room back there?

Q The counsel room.

A Yes, sir.

Q You talked with your counsel during the recess?

A Yes, for a couple of minutes.

Q Do you know now what a Performed Works Index is?

THE COURT: ~~Didyou~~ Did you talk about that? That is the next question I would like to know.

THE WITNESS: No. I went to the bathroom, your Honor.

THE COURT: That is what I intended.

Q Did you discuss your testimony?

A Well, they told me to keep going, you know.

Q Cheerleading I can't object to, but anything beyond that, I would suggest, I would object to.

You ware testifying before the recess, Mr. Sipes, about this Exhibit, Plaintiff's Exhibit 860, the notic form, the withdrawal form.

A Right.

Q Do you remember it?

A Right.

Q Could you tell me who prepared it?

THE COURT: If you know.

A I don't recall. I don't know.

Q You didn't prepare it?

A I, myself?

Q Yes.

A No.

Q Were you consulted in connection with its preparation?

A As I remember, I was consulted. It was discussed with me, yes.

Q But yours was not the hand that guided the pencil that wrote the words?

A That is correct.

Q You testified on your direct examination about a meeting you had had with Mr. Herman Finkelstein at the ASCAP offices sometime in 1969.

Do you remember that testimony?

A I think I said '68 -- the end of '68 or the beginning of '69.

Q Do I understand that you have had no business meeting with anyone else at ASCAP since that occasion?

A That's correct.

Q To your knowledge, neither has anyone else at CTN, is that right?

A Well, that's to my knowledge. I do not know of anyone else who has but I can't swear to that.

Q You testified, I believe, that when Mr. Finkelstein asked for six million dollars for ~~1970~~ 1970 for a blanket license and certain escalations in subsequent years, you made no counterproposal; is that right?

A No, I did not.

Q Did you say anything?

A Well, it's hard for me to recollect. I know there were certain conversations ~~arose~~ which arose. I can't recall the exact, any words that I particularly used; no, I can't.

Q Mr. Finkelstein asked you for certain escalations, right, in subsequent years?

A Right.

Q And he said that the escalations should be geared to rises in CBS's income, is that right?

A That is not my recollection.

Q What is your recollection?

A My recollection was that he said that there should be escalations up from the six million, year by year; each year being above the year ~~after~~ BEFORE --

Q Based on cost of living or what?

A No.

THE COURT: Just the passage of time, apparently. It sounds as if it was just the passage of time.

MR. TOPKIS: Perhaps.

A I really can't recall whether -- I know it was not tied to the CBS income.

Q It was not?

A Let me put it this way -- I do not remember that that was the point that he was making, no, I don't.

Q Did he say anything about inflation?

A No. Not that I remember. I can't recall.

Q In the years since 1969, have CBS rates gone up or down for its television network?

A Gone up or down? According to the particular programs? It depends on the particular programs. If you have got a disaster, you go down. If you got a good one, you go up.

THE COURT: Wait a minute. Aren't you talking about what CBS charges the people it charges?

MR. TOPKIS: Right.

THE COURT: Not rating.

THE WITNESS: I said, "Rates."

A (Continuing) You are talking about the rates for programs, revenue from advertisers?

Q Right.

A First, let me say I am not in charge of the sales department, your Honor, so what I am saying here is a general comment and not one that -- I am not the man

equipped.

Q Then I won't put the question to you.

A Okay.

Q Did you discuss with Mr. Finkelstein on that occasion any alternate form of licensing?

A On that occasion that we were talking about?

Q Yes.

A No, I did not.

Q That is the only occasion on which you have met with anybody at ASCAP on a business basis?

A That is correct.

Q You didn't ask his terms for a per program license?

A No, I did not.

Q Nor for a per use license?

A Not at that time, no.

Q And neither you nor anyone else at CBS spoke to ASCAP about a license for CTN from then until Mr. Woods' letter of December 1969, isn't that right?

A As far as my knowledge goes, that is true.

Q To your knowledge, when Mr. Finkelstein was speaking of increments, did he say anything about the increments bearing some relationship to the way the figures had increased in preceding years?

A That could have been. I don't remember, but that

could have been.

THE COURT: By the word "increment," I take it you both understand what you were formerly calling an acceleration.

THE WITNESS: I take it to be an escalation.

MR. TOPKIS: Escalation is right.

Q Increases in payment for the years subsequent to 1970.

A Yes.

Q So what he was suggesting was that the prior trend continue, is that right?

A As I say, that could have been what it was, yes. That the trend of escalation would continue, yes.

Q Are you sure of that? That that is what he was proposing?

A Am I sure that he was proposing that there would be an escalation each year?

Q And that it would be geared to prior increases.

A I am sure that he asked for an escalation each year. I said that it could have been that he geared that to the previous deal's escalations, if I am saying it clearly enough.

Q Yes, you are. I just want to know how sure you are and I am going to try to refresh your recollection by reading to you from your testimony at your deposition at page 74, at the bottom.

I was questioning you.

"Q When he spoke of increments, as increments, what increments did he speak of, as best you recall?"

And you answered:

"As best I recall, I think, my recollection is that he wanted increments as the increments had been in the past. In other words, some relationship to the way the figures had increased in the preceding years."

A Okay.

Q Is that right?

A Well, I am saying -- I guess that's right out of my deposition and, as I said, that could have been. It makes me say yes, that's what I said in the deposition and that's what it was, yes.

Q Neither you nor anyone else at CBS has ever asked a program packager or producer to deliver a program with performance rights annexed, have you?

A Not under a blanket license, no.

Q Nor under any other license?

A No. My experience is with a blanket license.

I don't know about any time previous to my own tenure, if that's the right word.

THE COURT: You never asked, but you have always operated under a blanket license?

THE WITNESS: That's right, your Honor.

Q I think I have asked you this before and, if I have, I apologize.

Neither you nor anyone at CBS has ever tried to deal individually with any member of ASCAP for TV performing rights, is that right?

A I said about as far as I myself am concerned, I have not, and I have no knowledge of anybody else.

Q You never sought any options on performing rights in the event that you dropped an ASCAP license, right?

A Option?

Q On any performing rights in the event that you dropped an ASCAP license.

A No, not as far as I am concerned.

Q When you were considering alternatives to the blanket license back in 1969, you considered direct licensing as a possible alternative? Direct licensing, by-pass licensing.

A What we have called by-pass?

Q Yes.

A Yes.

Q And you concluded that you didn't really know whether that could work if both ABC and NBC were also on a direct licensing basis, is that right?

A No. I think I said it wouldn't work if NBC and ABC -- excuse me.

I said that I felt that NBC and ABC would be delighted to stay with their blanket licenses and watch me hurt myself. I think that's what I testified to.

Q But, if ABC and NBC were both on direct licensing and you were, too, could you survive?

A Wait a minute. If I may, you are saying that all three of the networks abandoned ASCAP and BMI and all three pull a by-pass?

Q Right. Will that work?

A I must say I don'tknow and that's something that I would like to give a lot of thought to. I don't know.

Q You said a moment ago, I think you said that you thought that ABC and NBC would be delighted if they stayed on blanket and you went direct, right?

A That's right.

Q You thought --

A That was my thought.

Q You thought that that would hurt you badly?

A Yes.

Q Because they would have greater choice of music than you would have?

A No. Because I would be struggling as we went through before. I ~~heard~~ have the music and commercials ~~and~~ in the can problem that ~~started~~ staggered my imagination, maybe nobody else's but mine, and that I have the other problems that I discussed in my testimony.

Q You testified in response to questioning of counsel in connection with this proposed total ban on ASCAP's licensing the networks.

Do you remember your counsel stating that as a form of possible relief?

A By total ban, you mean the injunctive, the injunction?

Q Right.

A I don't want to sound like a lawyer, but okay.

Q So, let's talk for a moment about a world in which ASCAP and BMI are both enjoined from licensing any network.

Now, in that world, what could you do about live programs in which music was spontaneously interjected to avoid copyright infringement?

A Well, again, that would take a little thought, but one thing you could do is, of course, we could tighten

up our procedures on those programs because when you say live programs, Mr. Topkis, there is very little that goes over directly live.

There is always a little bit of a lag. I mean, you know, it can be taped and then, a half-hour later or 20 minutes or an hour later put on, so I mean you don't -- there are very few instances where, literally, somebody is in frontof the camera and appearsimmediately in your home.

I mean, not even, for instance, JackPaar's show. Those shows are live on tape shows.

Q Right.

A That is not a -- we have to be careful about the definition of live, you see, sir --

Q All right. Let's talk about the Jack Paar show er, to use one that I understand is doing better in the ratings today, the Johnny Carson show.

A It certainly is.

Q Which is, I think, on another network.

A It certainly is.

Q You have watched that show on occasion, haven't you?

We won't tell anybody.

THE COURT: I think he is entitled to take the Fifth on that.

A Occasionally.

Q In the interest of keeping track on the competition, you have watched that show on occasion?

A Yes.

Q Now, that show, as I understand it, is broadcast is taped in the early evening and broadcast in the late evening, is that right?

A As far as I can recall, that show on another network is done that way.

Q There have been times when it was broadcast live, right?

A The Carson show?

Q Yes.

A By live, now, we mean without tape?

Q What we oldfashioned types used to think that as where the camera turned and, simultaneously, it appeared at home.

A I don't recall the Carson show. I may be wrong but I don't think so. I don't think that show was ever a real, live presentation.

Q Have there been such variety shows down through the years?

A Years ago.

Q Many years ago?

A Yes. I think, again, less and less of that on the air than previously.

Q Indeed, the whole trend in television for many years has been to tape and film, is that right?

A More and more tape and film.

Q And, today, what programs do you broadcast live, if any?

A We are talking about real live?

Q Real live.

A Soap operas.

Q Soap operas you do live?

A Right. Occasional broadcast. You might have the President of the United States, a special event such as that, public event or -- we go on live.

Q A parade?

A Could be. Could or could not, again, it would depend.

THE COURT: I guess the President's appearance in Peking last year would be an example, wouldn't it?

THE WITNESS: No. That couldn't be live, your Honor. That was put in a can and sent back.

THE COURT: I thought part of it was.

THE WITNESS: There might have been parts but, usually, something from there is taped or canned.

THE COURT: But the speech the other night?

THE WITNESS: That was live.

Q And there are occasional pickups by Satellite, are there not, that are done live?

A Occasionally.

Q Isn't that what was done with the President's arrival in Peking?

A Yes, that could be.

Q And of course, there are sports events. Those are broadcast live, aren't they, typically?

A Typically.

Q If you wanted to eliminate the possibility of sudden interjection of spontaneous music on the live programs, how could you do it, except by putting them on some kind of time-delayed arrangement?

A Well, you could talk very harshly to the people involved and try to button them down, Mr. Topkis. That's one way of doing it.

Q And the price you pay, of course, would be destroying the spontaneity of the program?

A For spontaneous music? I don't understand that.

I mean, usually, they tell you, they know what they are going to play. You are talking about that

occasional occurrence in which somebody in the stands -- I can hold a sign up to the people in the stands and say, "Please don't play," but they will play anyway.

There will be instances, of course, occasional instances where that is going to happen.

Q The way you could eliminate such spontaneity to the greatest extent possible would be by issuing firm instructions and by going on a time delay, and by time delay I mean ten seconds or twenty seconds delay, something like that; that is commonplace in network usage, isn't it?

A Ten-second delay?

Q Seven seconds.

A Not in the network, no.

Q No?

A But, anyway --

Q Something like that?

A Those were the forms that could be used.

Q What would you do about a parade? Do the bands in a parade usually announce what they are going to play in advance?

A Yes, they do. They tell you before. In fact, they are supposed to have it so timed that as they approach your cameras, you know, supposedly what's going to be there, and normally you do know.

Q If you wanted them to play something else, you could tell them, "Don't play what you told us"?

A No, we don't do that.

Q You don't, today, because you have a blanket license but, the way that you could avoid infringement and a direct licensing ~~law~~ world, would be by telling them, "We are not licensed for that, play something else"?

A I don't understand the "world" yet. You mean we have a parade. There is a composition that Band A wants to play when it gets near the camera of CBS and what is the status of that --

Q And you don't hold a direct license for that composition.

A I don't hold a direct license for that composition?

Q Right.

A Then, if it's played in front of my camera -- you mean the man tells me up front that he is going to play that?

Q Right.

A I am going to tell him I don't have the right license for that.

Q That's the way you solve that problem, right?

A I don't know how it would be solved, but I would

tell the man that I don't have the license for that performance of that composition.

Q What would you do if the band leader changed his mind and performed the composition that he hadn't told you about?

A Well, Mr. Topkis, that would depend, I think. First of all, I think, one, I would talk to my lawyers. Two, if that band leader played his own composition, I think I -- I think that difference circumstances would present themselves.

As you know, many of the band leaders have their own compositions and play them and, if that happened, I think that would be a rather interesting situation.

If he played one that was not his own, then I would have to talk to my lawyers about it.

Q Those things happen. A They happen.

5A

Q On news programs do you sometimes pick up music that is being spontaneously performed?

A Could be, yes.

Q For example, protest marchers?

A Yes.

Q What would you do in a direct licensing world if some protest marchers burst into "We Shall Overcome" and you weren't licensed to perform it?

A I think that kind of situation -- and, again, I'm not trying to be anything but a businessman, I would have to talk to my lawyers about that, I don't know what legal defenses there could be to that, but I think in that situation -- if we did not have a license and could not obtain a license and there was no other way to solve that problem, in the interests of the news we would play it and take our chances.

Q You wouldn't think that there would be many such problems in direct licensing, would you?

A I would not.

Q What is your expectation?

A My expectation would be -- well, my expectation would be that the problems would be occarional.

Q And would be handleable or something like that.

A Again I say I think we could cope with a lot of

them, but if we couldn't I would have to see what other method we could devise. There would be a risk there, yes.

Q Now, when you were talking about a per use world, you contemplated, I think, that this Court would set license fees at the outset, right? That was put to you by your counsel as an element in the CBS proposal. Do you recall that?

THE COURT: Well, I think it was stated that they would be negotiated but that if they could not be negotiated they would do that.

MR. TOPKIS: Quite so. I apologize.

Q Do you remember that, Mr. Sipes?

A Yes.

Q And then you expected that in the light of experience the Court would make changes in a rate or would they be made by negotiation?

A In the light of what experience?

Q Market experience I think, was the term.

A Well, in the light of market experience, again we could discuss -- I think we could discuss -- this with ASCAP and BMI, and I think the Court could also take notice of the changing market conditions and adjust the rates accordingly.

THE COURT: Mr. Sipes, I would like to ask you a question about this concept of the Court fixing a fee, since I have a personal stake, or somebody does, in the concept.

Do you believe that the existance, the hypothetical existence, because all these propositions we are talking about are hypothetical, of a right to go to the Court if negotiations did not produce a result satisfactory to both parties would be a cause of people waiting and holding out and going to the Court, or do you think that negotiations could take place realistically even though there was a right to go to court?

THE WITNESS: Well, your Honor, I negotiate for a living. I do it all day. I always go into a negotiation -- if you set up a system, you say there is a possibility of negotiating and I think we should try very hard with ASCAP and BMI to make that happen.

THE COURT: Let me put it a different way. To what extent do you think that the fact that the parties could, if they didn't agree, go to the Court -- to what extent do you think that right would influence their attitudes in the negotiations?

If you are not prepared to answer that now, I would like to have your thoughts before you complete

your testimony.

THE WITNESS: Okay.

BY MR. TOPKIS:

Q If you held a per use license, Mr. Sipes, from ASCAP, the only reason that you would go to a copyright proprietor for a license would be because you hoped to get a license for lower than the per use rate, is that right?

A When you say "you," I take it you are referring to just CTN or packagers or --

Q To begin with, I'm referring to CTN. And so that there will be no surprises, my next question will involve packagers.

A May I have the question again?

(Question read.)

A Well, I would say that it would be right in the context that there might be uses -- that the use might be different than the use contemplated under the per use schedule. I mean, you might have a situation, for instance, in which you ~~have~~ have a feature performance schedule, but the producer putting the show together is only going to use four bars of the song instead of the whole song. This would lead you to believe that there should be a different price paid for the music.

Q You want the per use license to make provision

for such reduced uses, don't you?

A I don't know how detailed. Again, I don't think the world can be covered immediately, Mr. Topkis.

Q Mr. Sipes, were you asked this question and did you give this answer at your deposition, referring to page 65, line 11:

"Q Tell me, why would you ever go to the copyright proprietor if you knew that you could get the song from ASCAP under the per use license?

"A Because I might get it for less, Mr. Topkis."

Were you asked that question and did you give that answer?

A I take it you are reading from there, and that's my answer.

But you would be getting it for less even under the three or four-bar system I'm talking about, Mr. Topkis. You would expect to get it for less.

THE COURT: Well, the purpose of this trial is not just a duel between you and Mr. Topkis, of course, but to educate me, and I would like to understand this, Mr. Sipes.

Why you might go, I understand, to the proprietor of the copyright for a kind of use that you didn't have covered by the per use license with ASCAP,

let's put that aside for a moment, assuming that you either had all conditions covered by the per use license with ASCAP or you did already have a per use license with ASCAP for the kind of use you wanted to make in a particular instance, would there be any reason that you would go to the proprietor under those circumstances except to get a lower price?

THE WITNESS: I would think under those circumstances, your Honor, that the only reason I would go to a copyright proprietor would be to attempt to get a lower price than under the schedule.

THE COURT: I don't see that there is any great, huge admission in that, but we just want to understand what your theory is.

MR. HRUSKA: Excuse me for one moment. I think in restating part of the prior answer, your Honor, at least I got the impression from what the witness said that it was different from the ~~impression~~ IMPRESSION I got in terms or whether or not --

THE COURT: You can bring that out on redirect, if I am mistaken.

MR. HRUSKA: It was just a question of whether it was in the per use license --

THE COURT: I thought that Mr. Sipes in answering

Mr. Topkis' question as to why he would go to a copyright proprietor for a direct license, let's call it, when he had a per use license with regard to the composition in question, said that one of the reasons he might go is because the per use license that he had from ASCAP didn't cover a very small use of four bars.

THE WITNESS: Yes.

THE COURT: That's what I meant to suggest before.

BY MR. TOPKIS:

Q Now, under a per use license you would think that the same would be true of a producer, would you not, Mr. Sipes, namely that the only time that he would seek a direct license would be when he thought he could get it for less than the per use figure?

A If it is in the per use system, yes. That would be the reason he would go, to attempt that -- again depending upon different situations for the piece of music.

Q Now, all music that is used on Columbia Television Network that is on film or tape has been licensed for synchronization, has it not?

A I would hope so.

Q You've never heard of a time when it wasn't.

A Not that I know of.

Q And the only reason that performing rights could not be obtained at the same time as the synchronization rights are obtained from the copyright proprietor is that those people would be unwilling to deal with us, isn't that right?

THE COURT: "Us" meaning whom?

MR. TOPKIS: "Us" meaning CTN.

MR. HRUSKA: I object to the question.

THE COURT: I think what you are doing is taking an old answer and using it as a question. Ask him whether he said that once.

MR. HRUSKA: There is no definition of the kinds of circumstances.

THE COURT: I'll sustain the objection to the form of the question.

Q Synchronization rights are obtained from persons holding some interest in a copyright, is that right?

A Yes.

Q And so that there may be no uncertainty about it, I mean synchronization rights, for synchronization of material to be placed on a film or tape by a producer or by CTN, right?

A Yes.

Q Is there any reason why, at the time synchronization rights are obtained for that music, that public performance rights could not be obtained?

A We are in a world now of direct licensing, Mr. Topkis?

Q We are in any world at all.

A In the blanket license arrangement I am not going to ask to pay for music performance rights.

Q But is there any reason why you couldn't other than money?

A You mean ask for it?

Q Yes.

A Oh, I could ask for it, surely.

Q I mean the channel of communication has necessarily been established, right?

A Yes, I could ask.

Q In any kind of world, per use, blanket, per program, direct, anything.

A It could be asked for.

Q And in your view, the only reason that you could not obtain public performance rights -- you meaning CTN or the producer -- is a possible disinclination on the part of the copyright proprietors to deal with you, is that right?

A Well, since I have contact with the men, so we are positing that I could talk to him --

Q Right.

A The answer is, if I wanted to go for music performance rights at that time, the reason I couldn't get them is that the man would not make a deal with me.

Q That's the only reason that you can think of.

A Well, as of the moment. As of this moment that's the only reason, under that situation.

Q That is to say, when you are in contact with him, talking with him about synchronization rights, you can also talk about performance rights.

A I would think so.

Q And that would be true of all programs on film or tape, right?

A Of all programs on film and tape?

Q Yes. For all of those programs, synchronization rights are obtained, and when the synchronization rights are obtained you could simultaneously negotiate for performance rights.

A No, that's not true, because you don't know who the man that is representing the synch. rights -- who he represents. You may have 14 compositions. I don't know who represents all those 14 compositions or who the

people are. I mean, I don't understand your question. I can't go to the synch. rights man, who is negotiating synch. rights. Who else does he represent? Who else? There may be 15 people.

Q Well, now, you know there is really only one, isn't there? Harry Fox Agency.

A That is in synchronization rights, Mr. Topkis.

Q That's right.

A There are several other smaller ones.

Q Right.

A But you said I can ask for the music performance rights.

Q Yes.

A Does he represent the music performance rights for all those people whose compositions we are playing? I don't know that.

Q Agreed. You don't. Nobody does. But there is no reason why you couldn't, isn't that right?

A I don't know.

Q You don't know of any reason.

A I don't know of any reason why he couldn't?

Q Yes.

A I don't know of any reason why he couldn't except he may not.

Q Right. Okay.

THE COURT: Insofar as you know at the present time, he doesn't.

THE WITNESS: No, sir. Synch. rights are sold by themselves.

Q So your belief is that ASCAP members would be disinclined to deal directly.

A That many if not most, would be disinclined to deal directly.

Q Have you ever talked with any member of ASCAP, any officer of ASCAP, any member of the board of ASCAP, or anyone at ASCAP about this subject?

A About the subject of --

Q Direct licensing.

A You mean to ask them for a direct license or just about the subject of direct licensing?

Q The latter.

A Just the subject of direct licensing?

Q Yes, sir.

A Not that I can recall.

Q Now, you said, I think, that you would expect many ASCAP members to be disinclined to deal directly?

A I think I would be. That is, my opinion is that, yes.

Q Would you expect MCA to be disinclined to deal directly?

A What do you mean by "MCA"?

Q Music Corporation of America.

A That is a production company that makes motion pictures and television films.

Q Have you ever heard that it has a publishing house or two?

A Yes, I have heard. But that is not called MCA, though.

Q It is called Leeds Music and various other names.

A That's right.

Q The same organization.

A It is probably a subsidiary.

Q You wouldn't expect MCA to be disinclined to deal directly. And I am using MCA to include its subsidiaries.

A Under what circumstances?

Q Direct licensing.

A I bypass and I'm buying program from -- from Universal; it is not MCA.

Q Yes.

A I'm buying a one hour series from Universal.

Q Right.

THE COURT: A one hour what? Series?

THE WITNESS: One hour series, your Honor.

A And now what is supposed to be taking place, Mr. Topkis?

Q You ask them would they be inclined to license you directly for the performing rights or would they be disinclined. What answer would you expect?

THE COURT: This is assuming no blanket license.

MR. TOPKIS: Yes.

Q Assuming they are standing on your doorstep offering you this one hour program for performance.

A I still think they would be disinclined.

Q You don't think that in the event of their disinclination you would buy the program, do you?

A You seem to think that they can do whatever they want. I don't know what particular songs or who is involved with those songs, who the composers are; if they have a list that involves writers, what those writers are going to say.

Are you saying that Universal can force everybody there to do their bidding because I've asked for it?

Q No, sir.

A I don't believe that. I don't believe that.

Q I'm asking you whether you would expect them to be inclined or disinclined to deal with you for the performing rights that they control.

A Well, again --

MR. HRUSKA: I object to the form of the question. What does "them" mean in that question?

THE WITNESS: Yes.

THE COURT: We were talking about MCA subsidiaries, I understood.

MR. HRUSKA: Does the question mean to encompass MCA, Inc. and all of its subsidiaries?

THE COURT: So I understood it.

MR. TOPKIS: Of course.

A I don't think that Universal -- Universal may want to sell me that series. But Leeds Publishing Company is going to be disinclined to deliver those music performance rights. And I cannot answer you and tell you, "Oh, yes. Universal is going to be able to push them around because it is part of the company and make them do that." I don't believe that.

Q Did you ever hear of a man named Sal Chiantia?

A I have heard of him.

Q You have heard of that name, but you don't know Mr. Chiantia?

A No, sir.

Q So you think that one member of the MCA family or the Universal family would be trying to sell you a program but the other member of the Universal or MCA family would be disinclined to license the performing rights?

A I think he could be disinclined, yes.

Q And if he were disinclined, would you buy the program?

A I don't have the music performance rights, right?

Q So you wouldn't buy the program.

A What have I got? I got a program without music performance rights.

Q Which would be a terrible situation.

A For me, yes.

Q So you wouldn't buy it.

A I couldn't buy it. I couldn't put it on and compete with my competitors in the business.

Q Agreed. Now tell me, who at MCA or Universal do you deal with when you are buying such a program?

A The names of the people?

Q Yes. The top.

A Sidney Sheinberg.

Q Is he a man of intelligence and business acumen?

A High.

Q Would you think that he would be interested in selling that program to you?

A Sure he would be interested in selling the program to me.

Q And would you think that he would know very well that he couldn't sell the program to you if he couldn't deliver the performing rights of music that his company controlled?

A I think that would be so.

Q And having that knowledge, wouldn't you expect that he might talk with Mr. Chiantia and solve any disinclination problems which Mr. Chiantia might have?

A I can't answer that because I really don't know,

not only the internal situation of Universal, what they can or can't do. But weighing into consideration whether a commitment from me for a program outweighs the other problem, I can't answer that. I don't know.

Q Does CBS belong to ASCAP?

A CBS? I hope not.

I'm sorry. I don't mean to be flippant.

THE COURT: You don't mean does ASCAP own CBS, do you?

MR. TOPKIS: No, I do not.

Q Does an arm, division, subsidiary, or whatever, of CBS hold membership in ASCAP as a publisher member?

A I am generally or vaguely aware that under the Record ~~RRecord~~ Division of the company there is, I think, a music publishing company. April would be ASCAP. I think it is April Publishing Company, and I only do that by AA, BB.

The ASCAP Publishing Company would be April Music.

Q Let me reassure you that in the happy family of ASCAP is numbered April Music Company, a subsidiary, I believe, of CBS.

A I don't know that. I don't know whether it is a subsidiary or not.

Q Well, whether it be a subsidiary, a division or

what, would you expect that April would be inclined or disinclined to license CTN for the performance of compositions within its control?

A I don't think I can answer that question either. I've had no conversation with people to accomplish that.

MR. TOPKIS: Could I have that answer back?

THE WITNESS: I said I never talked to those people. I don't even know them.

Q You don't know any songwriters or publishers either. You seem perfectly free to express opinions on them. Wouldn't you do ~~the same~~ use --- formula ~~as~~ For April?

A I can't give you an answer on that, Mr. Topkis. I don't know.

Q All right. I'll pass on to another subject.

You purchase programs from a number of program packagers and producers, right?

A Correct.

Q Among the people offering you programs, or companies offering you programs, are Warner's, right?

A Right.

Q Paramount?

A Right.

Q Twentieth Century Fox?

A Right.

Q MGM?

A Right.

Q Desi-Lu?

A The company is out of business. The names have changed, to protect the innocent.

Q Would you expect any disinclination on the part of the publishing houses owned or controlled by those companies to license you to performing rights?

A I would say the same thing to you as I said about Universal. I really don't know the internal workings of those companies and how they would balance their particular problems.

Q You have down through the years on occasion dealt with program packagers, right?

A Yes.

Q On most programs there appears theme music - that is to say, an introductory few bars of music - and a sign-off few bars of music. That is commonplace in the industry, isn't it?

A Yes.

Q And similarly there is background music on most programs?

A Well, most -- it would depend upon the type of program, again.

Q All right. Let's talk about a dramatic program, situation comedy. It is commonplace with such programs to perform music behind the action, is that right?

A Yes.

Q And that is called in the trade background music?

A Yes.

Q Now, that is composed by people who are employed by the producer or packager who composed that music, is that right?

A Under the assumption that they are buying a man to do that music, yes.

Q Actually are you familiar with the way such arrangements are made?

A The deal between the people?

Q The deal and the way the music is composed and how it is used over and over again with continuing programs?

A No. I am just generally aware that those deals exist in the business.

Q That's all that you are aware of.

A Yes.

Q Then I will pass to another subject.

If you held a per use license, you would expect the packagers and the producers to deliver programs to you with the performance rights already obtained, wouldn't you?

A Under a per use license, when they deliver the program to me, that the music performance rights would be included in the package that they are delivering to me?

Q Right.

A Yes, I think I would.

Q Now, in that event the producer or packager would have to get the rights either from the writer or publisher or whatever, right? Someone holding authority to license under the copyright.

A Or the per use system.

Q Or the per use system.

But let us suppose that a writer is contemplating writing a score for a package program and the producer says to him, "Of course, I want the performance rights." You would expect a producer to say that when he was hiring a writer to score a program, wouldn't you?

A Under the circumstances that we are discussing?

Q Yes.

A I would think so.

Q That is to say, we are talking, let us say, about a situation comedy, a dramatic show, something like that.

A Under the per use system?

Q Under the per use system. A man is hired to write the theme music and the background music. That is the assumption I am asking you to make.

Now, in that situation you would expect that the producer would say, "I'll pay you a certain sum to write the music and to transfer to me the synchronization rights and performing rights."

A Right. Whether it is done by that man or his agent or whatever.

Q Right.

But that would be the transaction. In one transaction the writer would be hired to write the music and transfer the synchronization and performance rights?

A I don't know what you mean by "one transaction," but I would think that the packager would expect that all those rights that you have just been enumerating would be delivered.

Q Now, in your experience, nobody knows, at the time you first put a program of a projected series on

the air, how many episodes or programs of that series will run, isn't that right? You hope that it will be ten years but sometimes it is only --

A You do have minimum commitments.

Q What is the commitment?

A It would have to depend on the show. It would be anywhere from a year to a half a year. Normally not more than a year, but, again, there are exceptions to these things.

Q Okay. So there is a minimum commitment and a maximum hope.

A Right.

Q Does it sometimes happen that after the program has been on the air for a year or two on prime time -- I am thinking offhand of the "I Love Lucy" show -- that it would be rebroadcast by the network in non-prime time in subsequent years?

A That is a possibility.

Q Again a hope rather than a necessary expectation?

A Right.

Q Okay. But it does happen?

A It does happen. It is also subject,of course, to what kind of programs they would like in those other hours,

and that would influence whether or not it has a chance.

Q All right. So that when a writer is negotiating with a packager to write the theme and background music for a program, the writer can't know whether the program is going to run a year, a half-year or something way beyond that ~~and~~ and possibly into non-prime time later on and so forth, is that correct?

A That's true.

Q So it would be quite unfair for him to accept a lump sum for his work without regard to how many times the program that he had scored was broadcast, wouldn't you agree?

A First of all, I can't agree there because I don't know what the lump sum would be. It might be handsome money one way or the other, you know. It may be so good that if it's a minimum commitment, the other guy is hurt. So I can't answer that question. That is a balancing of the negotiation.

THE COURT: You mean it would be unfair to him if he had $500 but not if he had $5,000,000?

THE WITNESS: Right, your Honor. Or if the show faded out after thirteen episodes and he got $20,000. These things all depend upon what happens.

Q But when the writer couldn't really know what kind of price to ask because he wouldn't know how many times the

program is going to be run, isn't that right?

A No. I really don't understand. Maybe I am misinterpreting, if I may, for one minute.

Every day in the network, television business deals are made with people on just those expectations as you are talking about. We can hire, a producer can hire, a performer to appear in a pilot program -- a pilot program is the New Haven of the business, your Honor, a pilot program if it doesn't work; it is like the tryout show -- and after that you've got all the steps you are talking about. If the show goes to series, he will receive "X" per program; if the show appears daytime on a strip show, he will receive "Y" per program; if the show goes into syndication, which means individual stations all over the country, then he gets "Z" per program. All this is worked out.

Q Yes.

A Maybe I don't understand your question.

Q I will try to help you.

A But this is common practice in our business for all creative elements.

Q Right.

A And then there are other deals made where you pay a guy a lump sum of money. You may pay a man for two years

and the show fades after one year, you have to pay that man off. He may take the risk, that other kind of risk.

Q That's very rare, though, isn't it?

A It is rare for me and you. It is not rare for perhaps Cary Grant.

Q With the exception of such luminaries as Cary Grant, the more common way to compensate a creator for his role in the production of a television program is to pay him on the basis of the number of times and the ways in which the program whose creation he shares is broadcast, right?

A For certain types of creators, again. That would depend on the type of creator.

Q And you would expect that to be true of script writers?

A Yes.

Q The producer himself.

A Not necessarily.

Q The director?

A Perhaps.

Q The performers?

A Yes.

Q I have exhausted my ideas. Who else shares in the creative process?

A Well, you can have other people. You can have

costumers, dancers, -- costumers, no. They get paid and that's that. They could be the most marvelous series in the whole world, and it could go on forever, and you can stand and look and say, "The most glorious costumes I ever saw," but that is not true for costumers. It depends upon the element.

But all kinds of deals in all forms are made every day, and these deals are fleshed out up front for people. Even though the pilot program goes on and it is not acceptable and the show never gets on, we posted all these deals with people. They are all done.

Q Right. But typically then, you would think it more likely than not that a composer writing theme and background music would want to be paid in accordance with the frequency and manner of use of the program for which he was writing the score.

A Well, again I don't want to place myself in his mind. I think if I were a composer, perhaps that would sound right to me.

Q Okay.

A If I understand what you are saying. That the more it is run that perhaps there should be more money for him. But taking into account what I just talked about, that he might go another route. I mean you can't determine

that in the abstract here because the amount of money he might be getting in a different kind of deal would be more than he should have gotten because it doesn't work and the show is off the air.

THE COURT: Well, I'm not trying to force a position at all, but I get the impression that it is agreed by everybody involved -- correct me if anybody doesn't agree -- that there is at least likely to be a body of composers who would like to be paid with reference to the frequency of the use of the composition.

THE WITNESS: Yes, I think that could be said, your Honor.

Q Now, we have been talking about a world in which CTN ~~CBN~~ holds a per use license and it expects producers to come in with the performance rights in their hands when they bring the show in, right?

A Right.

Q In that situation, I suppose you would expect that CTN would report to the composer on how frequently his program had been broadcast or something like that, is that correct, so that he could make sure that he was being paid?

A I think there should be a reporting procedure so that everybody knows what is going on, yes.

Q And would you expect that ASCAP would monitor that reporting for its members?

A I think that might be right, under the circumstances.

Q Who would pay ASCAP for doing that?

A Well, I thought we discussed an administrative fee for ASCAP, did we not?

Q Well, we have, that's true.

Have you ever put a figure on that administrative fee in your thinking?

THE COURT: By discussions, I guess you mean in depositions, don't you? There haven't been any actual business discussions.

MR. TOPKIS: No actual business discussions.

Q My question is, have you ever put a ~~figure~~ figure, either in absolute dollars or in percentage or anything else, on that administrative fee?

A No. We would discuss that based upon all the elements going into making the administrative fee.

Q And if it were $500, it would surely be fair but if it were $5,000,000, it might raise problems?

A Well, I don't think your terms, Mr. Topkis, are ones that I would accept. I don't think that $500 would be fair.

Q It would be acceptable, surely.

A If that were a fair administrative fee. If there is nothing for you people to do, perhaps $500 would be right.

Q Well, we were just discussing a continuing audit of all performances of programs on CTN. That would surely cost us more than $500, wouldn't it?

A Well, I have no idea what it would cost.

Q Okay. You talked, Mr. Sipes, about music in the can, programs in the can, and commercials in the can, right? You remember that testimony?

A Right.

Q And as far as the programs are concerned, I think you put a value of over $100,000,000 on them.

A On our inventory as of this particular moment, yes.

THE COURT: Incidentally, how do you value something like that? Is that cost?

THE WITNESS: Yes; cost, your Honor, to us for that material.

Q At the present time, you expect to draw on that inventory down through the years and ultimately use it up, right?

A Yes.

Q And that process will spread over a number of years?

A In other words, you are saying to me, is the inventory I am talking about playable over a few years?

Q Right.

A Yes; that inventory would be playable over a few years.

Q And it will still have a value 3, 4 even 5 years hence?

A That may be for somebody else. I couldn't tell you.

Q You don't know?

A I buy rights for a period of time. After my rights are up, I am out. I mean, that is the general situation.

Q Included in the inventory that you have just

described there are programs, films and the like for which you have rights stretching ahead a number of years?

A Well, again, what do you mean by a number of years? Not that far --

Q Three, 4 or 5.

A Yes.

Q What is the longest term right which you hold to a program that occurs readily to mind? I am not going to hold you to it.

A That's rather difficult, offhand. We have some films -- I don't know where we are in the inventory process. This is material to which we have rights, now. There are a few items, of course, which we own which go back a ways. Those, of course, would continue beyond that period, so there are some materials which we own which we would have rights to stretch out into the future.

There are probably some that go 5, 6 or 7 years.

Q And the other networks are in the same position, perhaps not being so fortunate as to have a $100,000,000 investment, but they, too, have inventory in the can.

A They are roughly, I would say, similar.

Q And you believe that if you had to negotiate for the performing rights for the music contained in that inventory and had to negotiate directly for them, you would be

in big trouble?

A Under the bypass situation?

Q Yes.

A Under the bypass system, oh, yes.

Q And the same would be true of NBC and ABC?

A Well, I would assume that to be true from my own knowledge.

Q But you want an injunction against ASCAP's licensing any network, isn't that right?

A Do I want an injunction? No. I want a per use system.

Q As an alternative form of relief, your counsel here has stated that CTN would accept an injunction against ASCAP and BMI licensing any television network.

A Yes, as an alternative to per use. I would prefer a per use system.

Q Do you regard that injunction as a suicide pact or how would you solve the problem?

A I think that is a very serious problem. It would have to be solved under an injunctive procedure, the problem we talk about, the inventory for all three of us; yes.

Q Do you have any idea how it could be solved?

A Well, I can give you an idea but not, again, not as a lawyer, but as a business man -- to have some kind of use

payments for that inventory under an injunctive system, but that's an idea.

Q Again, you would have those payments determined either by negotiation or, if negotiation failed, by Judge Lasker or some other judge of this Court?

A Yes.

Q As to your $100,000,000 inventory -- excuse me. Let me back off for a second.

You spoke of it as being over $100,000,000.

A Yes.

Q How big is that?

A I don't want to tell you, if I may not. It's a business --

THE COURT: If you consider it confidential, unless Mr. Topkis can tell me whether it would make much difference whether it's one hundred or two hundred million, I would sustain it.

MR. TOPKIS: I wouldn't suggest that, your Honor.

Q I would like to know, is it more like a hundred or more like a half a billion or a billion. I think that is enough for us to grapple with.

MR. HRUSKA: Here, again, the figure, a hundred million, is --

THE COURT: I am satisfied to sustain the confidentiality of this unless there is some showing as to why the

difference in the scale would make a difference in the outcome of the case.

MR. TOPKIS: All right.

Q Most of the inventory that we have been speaking of has been acquired in the last five years, hasn't it?

A Well, again, I would have to think about all of that but I would say generally, a good part of it, maybe much of it has been acquired over the last 5 or 6 years.

THE COURT: We are talking in terms of the proportion of the items, I take it, not the value.

MR. TOPKIS: Well, I ~~really~~ really meant value.

THE COURT: Or maybe they are the same.

A Well, then, your Honor, I would have to think about it a little bit. It depends, you know, on the elements I have there and when they were bought.

THE COURT: You may have some valuable old things?

THE WITNESS: Right, sir.

A I would say a good part of it has been bought within the last six years.

Q Well, let's start with January 1, 1970. Would you say that 60 or 70 percent of that inventory has been bought since that date?

A Since January of 1970?

Q Right.

THE COURT: Two years, four months.

A No. I would really have to take a look at when all our deals were made, to give you an answer to that.

MR. TOPKIS: Your Honor, we are surrounded by arithmetic majors. It's 3 years and 4 months, I am told.

THE COURT: That is correct.

Q Your answer doesn't change if it is 3 years and 4 months.

A No. I said I would have to think about it.

Q Could you possibly refresh yourself on that subject over the noon recess and I will come back to it.

A Sure, sure.

MR. HRUSKA: Your Honor, may I suggest perhaps Mr. Topkis would tell us the relevance of that before we go to work and try to do any checking on this over the lunch recess?

THE COURT: What do you consider to be the significance of the extent here of the value they acquired in recent years?

MR. TOPKIS: Your Honor, I think that this is a problem that CTN could so readily have avoided. It, after all, began this litigation on December 31, 1969, and I would like to know how much of the problem it now poses it would have avoided or could have avoided during the pendency of the litigation.

MR. HRUSKA: I dont see what the figure --

MR. TOPKIS: I can suggest various ways of doing that ~~an~~ And I am not making a request for anything other than the roughest kind of approximation. I don't want a survey made over the lunch hour.

THE COURT: Just a minute, Mr. Hruska.

Mr. Sipes seems to think he can accommodate the request during the lunch hour. If it turns out to be a big deal, he can let us know and, if it doesn't turn out to be a big deal, then we would like to know.

MR. TOPKIS: Your Honor, I find myself in a little bit of uncertainty and I have very much in mind your desire to use witness time effectively.

The problem that I want to mention is that it seems to me that possibly our target has changed slightly by the testimony about the indispensability of the Court establishing some kind of a payout system in the event of an injunction against our licensing all three networks.

I would like to have a statement as to what our target is on that subject and I will say no more about it right now, but go back to Mr. Sipes.

THE COURT: I thought that Mr. Hruska did, in effect, make a statement by the letter to the Court this morning on that subject.

MR. TOPKIS: But I don't think that this letter says anything about a payout system.

The witness has just testified that in the event that an injunction were issued against ASCAP and BMI licensing all three networks, in order to solve the in-the-can problem, there would have to be, accompanying that injunction, some ~~kin d~~ Kind of Court administered setting of fair fees for the material in the can and I would like to know what CBS's proposal on that subject is so that I may direct myself to it.

THE COURT: All right. Why don't we break for lunch at this time without, at the moment, stating what CBS's obligation is. We can talk for a minute in the robing room and see what it is on that point.

We will resume at two o'clock.

(Luncheon recess.)

OFFICE COPY ENTERED

AFTERNOON SESSION

2.00 P.M.

DONALD SIPES, resumed.

THE COURT: Before we proceed, Mr. Topkis, at the conclusion of yesterday's proceedings I requested CBS to state for me, preferably in writing, what its position was with regard to this question that had been raised yesterday about its proposing at that time that a withdrawal right of a copyright proprietor must be exercised with regard to all television networks if it were to be exercised for CBS.

I received from Mr. Hruska a letter which specifies what CBS's position is on that point, and it excludes such condition. I have it here and I am making it a Court exhibit as part of the record.

MadameClerk, would you please mark this as Court Exhibit 1.

(Court's Exhibit 1 marked.)

THE COURT: Furthermore, in a robing room discussion a moment ago, CBS advised the Court that its proposal with regard to the question which had arisen shortly before we left for lunch, on the question of what procedure would be followed in the event the Court enjoined ASCAP and BMI from licensing all television networks, with

regard to music in the can and commercials in the can, that CBS's position was and is that CBS, or any television network presumably, wishing to secure the performance rights for the music of such material would be obligated to negotiate with the copyright owners to set a fee for its use and, within a period fixed by the Court if the negotiated fee were not agreed, the Court would fix a fair or reasonable fee.

Do I correctly state the position of CBS on that, Mr. Hruska, as its proposal?

MR. HRUSKA: Well --

THE COURT: If not, would you please state it?

MR. HRUSKA: Yes, your Honor. Frankly, I never thought on one of the things you just said. It is an interesting idea.

The position I thought I had, or what I tried to state to you, was that we would attempt to negotiate the per use schedule of rates for music in a can with ASCAP and BMI and that we would have a per use license from ASCAP and BMI with respect to the subsequent uses of that music.

THE COURT: Yes, I think that is what you did state, and I think I misstated it, and I believe that is clearly stated now.

I must make it clear for all concerned that all I am asking CBS to do is to state what its proposal is, and it is entitled to make any proposal it wishes, and that is the proposal which it is making.

MR. TOPKIS: May I just have it read back, your Honor, so I may be sure I have it?

THE COURT: Mr. Reporter, would you read it back?

(Record read.)

THE COURT: I take it that inherent in an apparent paradox, which may be, to wit, that there be an injunction against ASCAP and BMI licensing the networks, would be an exception which would permit this procedure which would be of limited duration because the material in question would die sooner or later; is that correct?

MR. HRUSKA: Yes, your Honor. And what I had not said in my statement, which I perhaps should add to make it clear, is that in the event CBS on the one hand and the licensing organizations on the other hand could not agree on per use rates for that material, then we would want to come back to the Court and have the Court set those rates for this limited amount of program material.

THE COURT: Thank you.

All right, Mr. Topkis.

CROSS EXAMINATION CONTINUED

BY MR. TOPKIS:

Q Before lunch we were talking about your inventory in the can. Now, you had a similar inventory in the can in 1969 towards the end of the year, did you not? And by similar I mean you had programs and rights that you had purchased which would run forward in time for a number of years.

A Yes.

Q I don't mean to suggest that it necessarily had the same value. For all I know, it might be more than a hundred million or less. But you did have a somewhat comparable inventory, right?

A I don't know if it was comparable. I had an inventory.

Q Okay. That is sufficient for my purposes.

In 1969, when you were contemplating what course of action you should follow vis-a-vis ASCAP and BMI, did you contemplate the possibility of dealing directly for performance rights, by-passing ASCAP and BMI, and solving your in the can problems by going to Judge Ryan, asking for a blanket license, and suggesting that its rate should sharply be reduced by reason of the number of direct licenses that you would obtain?

MR. HRUSKA: Your Honor, may I have that read back?

THE COURT: It seems to me the first question, which would make it a lot simpler if the answer is no, as I contemplate it will be, is whether you went to Judge Ryan for any relief with regard to music in the can in 1969.

MR. TOPKIS: No. I'm sorry, your Honor. I must not have expressed myself clearly. I will do it again, if I may.

THE COURT: Read the question back.

(Question read.)

THE COURT: Would obtain.

MR. TOPKIS: Yes, sir.

MR. HRUSKA: I object to the form of the question.

THE COURT: You object to the form?

MR. HRUSKA: Yes.

THE COURT: It is a complicated question, but I think it is understandable.

Perhaps you can answer it by a representation from CBS whether they did or did not.

MR. HRUSKA: I might be able if I understood it, but I frankly did not. And I think it has about two convolutions in there that make it awfully hard.

THE COURT: Let's try and break it up in pieces, Mr. Topkis.

MR. TOPKIS: I'll be delighted.

THE COURT: I can see that you don't want to ask what happened but what he contemplated, is that correct?

MR. TOPKIS: That's right.

Q In 1969, Mr. Sipes, you were thinking of possible alternatives to a blanket license as you had previously had experience with, right?

A Right.

Q You were concerned about going on a total direct licensing basis because of your fear of disinclination on the part of ASCAP members to deal with you, right?

A Right.

Q Did you contemplate the possibility of testing out that fear by trying to get direct licenses, as many as you could, and simultaneously going to Judge Ryan and saying, "We want a blanket license and we want the rate reduced by the degree to which we have achieved direct licenses"?

A Well, that situation seems to be one of my gambling assets and then hoping --

THE COURT: No, Mr. Sipes. You are not being asked to tell what your reaction to the suggestion is.

You are only asked whether you contemplated doing that at any time.

THE WITNESS: As far as I can recall, your Honor, I did not contemplate doing that.

THE COURT: All right.

Q Didn't think about it at all.

A Well, I say I didn't contemplate doing that.

Q Okay. Let me ask you to think about it right now and tell me whether in your judgment it would serve the interests of CBS.

A Well, first of all, I would be going to Judge Ryan and asking for a reduced blanket license, is that correct, under your -- is that what you said?

Q I think my question was very clear. It certainly contemplated that, yes.

A Then I am still in the same blanket license situation I am now.

THE COURT: Let's be sure that everybody does understand each other. There is no point in having a question answered on the basis of a misapprehension.

There are two senses in which the phrase "reduced blanket license" can be understood, one in scope and one in price. As I understood it, Mr. Topkis, you were asking CBS whether it contemplated the idea of asking Judge Ryan

to give them a blanket license but reduced in price by virtue of the fact that they might have secured some direct licensing, is that correct?

MR. TOPKIS: Exactly.

THE COURT: That is what he is asking.

THE WITNESS: Thank you, your Honor.

A Well, there again I am assuming, under your hypothesis, that I could have achieved some of these options. And then I have to assume that Judge Ryan would take that into consideration in giving me a reduced license. I can't -- I would not take that route of going out and trying to obtain a license -- licenses directly -- when I said that I didn't think --

I would be going out and, even assuming that I could get somebody who would be willing to deal with me, which I doubt, but assuming that, I would have to make option deals with those people, put up company money for that, and then hope that the Court would take that into consideration in reducing my blanket license.

I wouldn't go that route, Mr. Topkis. That's a bad gamble, as far as I'm concerned. I don't know what the Court is going to do. If the Court doesn't give me that, I've wasted all that option money.

Q Well, you know that ASCAP's amended final judgment requires ASCAP to offer you a blanket license at a reasonable rate and that Judge Ryan or his predecessor or successor stands by to insure the reasonable rate.

A It is a reasonable rate as far as blanket licenses are concerned, is it not?

Q But you lack confidence in the rate fixing proced-

ure for a blanket license, is that it?

A No, Mr. Topkis. I didn't say I lack confidence --

THE COURT: I understood him. He just said he didn't know what price Judge Ryan would set.

A That's right. And also I would still be in a blanket license situation.

Q What is it, Mr. Sipes, that makes you seek rate fixing in this action, ~~bth~~ both as to a per use license and as to the per use feature which has just this afternoon been added to your injunctive form of relief --what is it that makes you seek judicial rate fixing there but not judicial rate fixing under a blanket or per program license?

A What do you mean by rate fixing? I'm sorry. I don't understand that in the context of what we were discussing.

Q I will try and break it down for you. As I understand your counsel's proposal in this action, you seek two forms of relief: One, a per use license with a per use rate to be set by the Court if the parties can't agree upon it; two, an injunction against all network licensing by ASCAP and BMI, with an escape hatch to cover your in-the-can situation in the form of Court fixing of per use licenses for productions in the can.

THE COURT: If not negotiated.

A First of all --

Q I'm not done.

A I'm sorry.

Q There are seeking judicial rate fixing. Do you follow me that far? On either leg of the relief that you seek in this action.

A No. First we are looking for negotiation.

Q Negotiation first and judicial rate fixing --

A And you would expect and hope that that negotiation between the parties would be carried on in good faith and that there would be a deal made, Mr. Topkis.

Q Right. That's what you expect and hope. But, failing that, you want this Court to be standing by to fix the rates. That's what your counsel has said.

A Failing that, in this situation, in this music-in-the-can particular situation, because there is no other way out that I can think of to solve that particular problem.

Q Yes. Okay.

So, in those two situations, that is, the situations you are addressing yourself to in this litigation, you are content with judicial rate fixing as a final fall-back technique, right?

A Well, as a final fall-back, whatever those words

may mean.

Q Yes. I'll bet you understand. If you are having difficulty, I'll try again.

A Why don't you try again?

Q Really, I don't think I need to. Go ahead.

A Well, you offered to.

Q I equally don't think you fail to understand to me so completely as you profess. Do you fail to understand me?

A I agree with you. I don't think that there is -- I will try to answer your question, if I may.

Q Okay. Fine. Please do.

A If I can have the question read back to me, please.

(Question read.)

A In the situation which we could not negotiate the per use fees together for the particular music-in-the-can problem, I guess I would accept a determination of the Court.

Q And also for per use across the board, not only just as to music in the can.

A Yes.

Q Okay. Now my question to you is this: What is it about those two techniques that make you willing to

accept them as appropriate techniques while you are not willing to gamble the assets of CBS on rate fixing in Judge Ryan's courtroom following good-faith negotiation?

A Because what I am achieving here, hopefully, is a per use system, where I would be paying for music as used, where direct licensing will take place more and more in the market place and where we will arrive at a situation where music is bought like all other elements, on an as needed competitive basis.

Q All right. We will come back to that. But let me ask you this right now:

Your basic concern about the technique of acquiring direct licenses and asking Judge Ryan to give you a blanket license at reduced rates by reason of your direct licenses is that you don't want to gamble with your company's assets; isn't that what you said?

A I am saying that I do not know whether the judge will take that into consideration, and, two, that I am still in a blanket license situation, yes.

Q It is the uncertainty of it that troubles you particularly, right?

A The uncertainty?

Q Yes, the uncertainty of what Judge Ryan will do; that is what you just said, isn't it?

A Plus the fact of a blanket license.

Q Yes, I understand that.

A Okay.

Q You had a quarter-century use of blanket license experience in television, right?

A I'm not sure of the exact number of years, but it has been a number of years.

Q You have had, CBS has had, no experience whatsoever with per use licensing, whether it be for television, radio or any other form of communication, right?

A Regarding music performance rights, you mean?

Q Yes.

A As regarding music performance rights, correct.

Q Do you think of yourself as gambling CBS's assets in seeking a per use license?

A No, I don't.

Q You think of it as a relatively sure thing?

A I think, in my considered opinion, that in the long run, if we can get ourselves into a competitive market place with a per use system, that I will not be gambling the company's assets.

Q You spoke about commercials in the can. There are some of those, too?

A Yes, there are commercials in the can, yes.

Q Owned by what agency, to your knowledge? Or don't you know?

A Owned by many agencies.

Q Do you know?

A Do I know ~~the~~ thc names of the agencies, do you mean?

Q Yes. Have you seen contracts between agencies and creators of music or creators of commercials?

A No. I don't get into agency deals.

Q Okay. So that's not your field of expertise?

A That's correct.

Q We had better look to somebody else to get the straight facts on that, is that right?

A To get the straight facts?

Q Yes, the real facts as opposed to opinion, hypothesis, guess, speculation, and so on.

A Well, all right. I said that is not my area. I think perhaps you are right, you should go somewhere else to get the answer you may be seeking, Mr. Topkis.

Q Very well.

Now, you have been saying that you buy everything else, all the other program elements that you purchase, one by one, and that's what you want to do with music, right?

A Well, again, you say all the other elements one

one by one. Do you mean that I buy elements separately, that a packager would buy elements separately in building a show?

Q Right.

A Defining "elements" as what?

Q Whatever you were using it as when you used it.

A If you are defining it as I used the term, yes. You go out and buy elements one by one to make a package program.

Q And when CBS produces a program, it buys the elements for the program that way, right?

A That is correct.

Q When CBS pays programs, though, it doesn't buy programs that way, does it?

A Well, I don't understand you.

Q Well, you frequently buy programs in vast bunches, don't you?

A You mean you buy them -- you mean when you buy a series? Is that what you mean?

Q I will offer you a few possibilities.

CBS has a contract with the American Basketball Association for a whole bunch of basketball game broadcasts.

A Yes; there are a number of games, right.

Q And you have another contract with the World Hockey Association for a season of broadcasts of hockey games.

A Yes. That is about over, right.

Q And you have got some contracts with professional football for a whole season's games of professional football.

A Correct.

Q And you have bought movies in bunches and clusters

and so forth, have you not?

A Clusters? We buy packages of movies, right. But we evaluate the movies we are buying, one by one. We evaluate each one of the movies in the package. It is not like ~~being~~ buying bananas. It is not the same thing.

Q Let's agree quickly that neither movies or Cole Porter songs are very much like bananas.

A Agreed.

Q We have reached agreement on that.

A Okay.

Q When you buy a situation comedy series, typically, you will buy a few or commit yourself to a few, a half a year or something like that, with an option on the program until for as long as you can get it, make it successful.

A As long as I can get it, okay.

Q So there is nothing so totally extraordinary about buying things in bunches about television, is there?

A Wait a minute. I think we are -- anyway, I feel confused.

I am not -- let me --

Q Why should you be alone?

A Okay. We are both together.

I ~~guy~~ buy the Lucille Ball Show because I want the Lucille Ball Show and I will buy a number of programs of

the Lucille Ball Show but I am not making a deal where I am buying just a bunch of bananas. I am buying that particular show with that particular lead.

Q You want to buy it program by program, right?

A That's correct.

Q Why don't you take a program license from ASCAP?

A Take a program license from ASCAP?

Q I said why don't you take a per program license from ASCAP?

A I thought we went into that before. I testified to that before, didn't I?

I think I have testified as to why I didn't think it would be right for us.

Q I don't think I have asked you about it but I could be wrong.

A I didn't say that. I am sorry.

THE COURT: Mr. Topkis is asking you now.

THE WITNESS: I am sorry.

THE COURT: He is asking you why --

Q My question is, why don't you take a per program license from ASCAP?

MR. HRUSKA: I object to that unless the particular terms of per program license are defined.

THE COURT: I assume as per program license is

provided for in the ASCAP licensing agreement that is in evidence.

MR. HRUSKA: All right.

A That's a station --

THE COURT: Is that what you mean?

MR. TOPKIS: No, your Honor. I mean the per program license contemplated by ASCAP in the decree.

THE COURT: Is that different from what is in the exhibit?

MR. TOPKIS: What is in the exhibit is a local station per program license of a particular form. It has various terms and privileges.

THE COURT: Let's not restrict it to the exhibit, but as provided for in the amended decree.

MR. TOPKIS: Exactly.

MR. HRUSKA: That could be an infinitely rare type of provision, particularly the provisons on the particular area that I think Mr. Topkis wants to examine on, namely, the direct licensing. We went through that this morning, and --

THE COURT: He is not talking about direct licensing, as I understand it. He is talking about CBS's buying a license to use all of ASCAP's music on a particular program.

Is that right?

MR. TOPKIS: Right, your Honor.

THE COURT: I see no difficulty in that question and if there is, you can refine the answer on redirect.

So, to get back to the question, would you tell us why it is that CBS is not interested in buying a license to perform ASCAP music on a per program basis?

THE WITNESS: Well, ~~again,~~ your Honor, I would have to know the terms. Are those terms the same as we looked at in this agreement this morning, because it would depend upon the terms.

Do I have to get a hundred per cent of all the people involved with every composition in the program to make deals with me, or if I miss one person, do I owe a payment to ASCAP for that particular program? Is that the per program license? What is it?

Q Per program license that I have reference to is of no greater or lesser dimension than is set forth in the amended final judgment by which ASCAP is bound.

THE COURT: It is reasonable for Mr. Sipes to be educated as to what the terms of that are.

MR. TOPKIS: Right.

Q It provides that ASCAP shall issue a per program license, the fee for which is at the option of ASCAP,

either expressed in dollars or based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or television casting facilities of such radio or television broadcaster.

MR. HRUSKA: That is not a full reading.

MR. TOPKIS: Of course not. I could go on for half an hour. I think I have given the information.

MR. HRUSKA: One thing left out from the decree provision that Mr. Topkis was just reading from, states in full that the fee for the per program license in the case of commercial programs is at the option of ASCAP either (a) expressed in terms of dollars requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed -- the last phrase was not read -- or (b) based upon the payment of the percentage of the sum paid by the sponsor of such program for the use of the broadcasting or television casting facilities of such radio or television broadcaster.

THE COURT: You are talking about such a program?

MR. TOPKIS: That's exactly what I am asking.

A Again, may I see it or read it?

THE COURT: Yes. Give Mr. Sipes a copy.

(Document handed to the witness.)

THE COURT: Why don't you read it to yourself

first.

(Pause.)

THE COURT: Have you read the provisions relating to this?

THE WITNESS: I think so, your Honor.

THE COURT: Let's just be sure for the record what we are talking about. We are referring to the provisions in the amended decree of the United States against ASCAP.

A Under this situation, one, I take it that I would have to pay a fee set up by ASCAP for a program whether there was two bars of ASCAP music in that program or whether there were twelve songs and ASCAP could get whatever that was, right? I would have to pay for that program, no matter how much of the music was ASCAP's.

THE COURT: I understand under the decree that you would negotiate with ASCAP for a fee and if you didn't reach agreement, Judge Ryan would set it.

That gives them power up to a point.

Am I correct that that would be the terms of reaching the fee?

MR. TOPKIS: That is quite correct, your Honor.

A (Continuing) Well, that is the first thing I want to say.

The second is that almost all [illegible] programs, as we have discussed, contain music in them of one degree or another and what would be happening here is that I would literally be paying a fee to ASCAP for every one of these programs, no matter how much music was involved in that program, so what I am basically ending up with is a blanket license at a fee I don't know anything about. It hasn't been set in here.

Q No. It is subject to negotiation. And your forte is negotiation, isn't that right?

A Well, so far with ASCAP and BMI, it doesn't seem to have been, doesn't seem to have happened. I am fallible.

Q Well, you say you are fallible. Someone is fallible, as I understand the term, who tries and fails, right?

THE COURT: Well, let's save that for a brief.

Q Well, let me ask you this question, if I may, Mr. Sipes.

Did you ever try with ASCAP?

A To get this program license?

Q To get anything? You, personally, Donald Sipes.

A I had a meeting, as I told you, with Mr.

Finkelstein. That meeting led me to believe that I could not get out from under that blanket license escalating system.

Q Did you in that meeting ask to be let out from under that blanket license escalating system?

A As far as I can recollect, no, I did not.

Q That is what I thought.

Would you regard that as fairly representative of the good faith negotiating technique you have been talking about in this court, which you would propose to engage in in order to set per use license rates under either of your reliefs that you seek here?

A Mr. Topkis, in that situation, my feeling was that it was futile for me to attempt that.

Q You testified this morning about how you could control sudden interpolations of music into programs which you broadcast live.

Do you remember that testimony?

A Yes, sir. I think.

Q Now, there is, is there not, frequent instances of unscheduled band music at football games; isn't that right?

A Well, again, I don't know what the word "frequent" means, Mr. Topkis. It happens.

Q Well, how about "many"?

THE COURT: How about what?

MR. TOPKIS: "Many," m-a-n-y.

A Perhaps in the context of foc ball games, that could be true. I don't, I couldn't quantify it any better than that.

Q Is this statement true -- that at football games band directors generally give the CBS music clearance section about one week's advance notice of the songs to be performed and an appreciable number of which have been written by those directors and many of them, the songs, not the directors, are performed without notice?

A I think that could be true; that could be.

Q And bands performing in parades ordinarily supply CBS with lists approximately a week in advance of the songs most likely to be played as the band passes the CTN mobile unit, isn't that true?

A Yes, sir.

Q But as often as not, the bands perform unlisted music at that time, isn't that right?

A Yes, sir.

Q And new bands are added to the parade without notice, isn't that right?

A That happens.

Q And loud speakers on floats reach the CBS sound equipment, isn't that right?

A True.

Q And don't regularly scheduled news broadcasts and live news events sometimes contain music?

A Yes.

Q A band may be playing while the president reviews troops?

A Yes.

Q An interview may take place at an airport at which music is being played in the background?

A Yes.

Q And protest marchers may even sing freedom songs?

A May even, yes.

Q I understand ~~thatmany~~ that many of those freedom songs are in the BMI pool.

A No comment.

Q Oh, please. That's your language, isn't it?

A Yes, I seem to recall that.

Q All I am doing is speaking up for equal treatment of ASCAP. We are happy to claim a number of freedom songs.

So, too, with political conventions, Mr. Sipes,

isn't it a fact that very frequently there are songs nobody ever expected that turn up?

A Yes, sir.

THE COURT: Even nominations not expected.

Is there any way of either the witness or counsel by stipulation giving me some feel of the scope of this problem that we are talking about? I assume that at least I could get this much agreement -- that if it was minimal, it would be regarded in one way, and if it was significant, it would be regarded in another way.

I have no way of judging at all whether we are talking about a serious problem or one that just happens to be interesting to discuss.

MR. HRUSKA: Well, I think, Judge, we are talking about a problem which is covered by the fair use --

THE COURT: I understand that, but assuming it isn't, Mr. Topkis, Mr. Hruska said that he, of course, takes the position that this music is covered by the fair use doctrine and I understand that but he doesn't pretend that it needs to be decided by the Supreme Court, and I don't want to interrupt the proceedings but I would like to have in mind whether there is any way of getting at the scope of what you are now talking about.

MR. TOPKIS: Perhaps we can talk among ourselves and see if we can arrive at something then.

As a matter of fact, I will ask Mr. Sipes right now.

Q Can you say with some sureness, Mr. Sipes, and I emphasize the "with some sureness," how frequently such instances may occur?

A I think under the light of these circumstances, we ought to take a crack at trying to get some, as I said, a real feel.

THE COURT: I take it you mean that some inquiry be made as to how often it actually has occurred?

THE WITNESS: Yes. We will try to dig that stuff out, if we can.

Q Mr. Sipes, as I understand the CBS per use proposal here, with the exception of ASCAP members who

withdraw their compositions from licensing under the per use license, CBS wants to have the right to use any music remaining in the designated ASCAP repertoire under the per use license, right?

A The people who have ~~proved~~ pulled their particular compositions or whatever, the right to use would extend to whatever is left in the designated reservoir.

Q Yes.

A Yes.

Q Now, one thing that puzzles me is this:

Do I understand correctly that you propose no compensation at all for the man whose music remains in the repertoire subject to license which you don't use?

A Well, I must say that we did not contemplate that.

THE COURT: May I be advised whether in present circumstances a composer whose music is not used during a given year would receive any payments under the present ASCAP plan, on the one hand, and BMI plan on the other?

MR. TOPKIS: So far as a composer is concerned, your Honor, if he has --

THE COURT: I shouldn't have just said composer. I guess I should say Composer or lyricist or whatever it may be, somebody whose work is not used.

MR. TOPKIS: So far as ASCAP is concerned, an ASCAP publisher is paid on a straight current performance basis. If his work is not performed during the particular period, he receives no distribution during that period.

An ASCAP writer, lyricist, composer, has the option, with certain not here relevant conditions, to decide for himself whether he will be compensated on a straight current performance basis or on what is called the four fund basis.

The bulk, I am advised, although I don't have the figure at my fingertips, of ASCAP composers, authors and lyricists, elect the four fund system.

Under the four fund system, current performances are only one of four factors taken into account and, so, it is entirely conceivable that a writer member who elected the four fund system and received no performance credits during a particular period would, nonetheless, receive a distribution.

THE COURT: Is that your understanding, Mr. Hruska?

MR. HRUSKA: Yes. The addition I would make to it, it's my understanding that one of the factors in the four fund distribution is longevity of ASCAP membership, so that would be based to some extent on how long the

writer was a member of ASCAP.

THE COURT: I am not asking what the factors are. I only want to know if, under the present arrangements, it now boils down to the fact that the composer, writer or lyricist can be paid something during the year, even though his music or writing is not performed, and I gather the answer is yes.

MR. HRUSKA: Yes.

THE COURT: Is the same true in BMI, Miss Kearse?

MISS KEARSE: It is conceivable that a writer or publisher could be paid, despite the fact that there were no performances of his work during the year, but it is extremely unlikely.

MR. HRUSKA: Your Honor, it's my understanding that BMI writers, many of them, receive guarantees and advances and certainly in the case of guarantees, would be paid, irrespective of the performance and would receive the advances, although that would be subject to reductions.

MISS KEARSE: That's correct. There are advances and guarantees and occasionally it happens that there are payments ~~over the performances~~ in excess of performance payments.

THE COURT: Thank you.

BY MR. TOPKIS:

Q Mr. Sipes, Exhibit 540, I think you testified, is a list which may be described in part,at least, as the CBS night time and daytime color schedules for '72-'73, and I think that is all it is, really. I think that describes it in toto.

What I would like to do is, if I may approach the witness, your Honor, and perhaps you have another copy, Mr. Hruska, that I could give the witness --

MR. HRUSKA: Surely.

Q Let's start on what is, on my copy, the top page, the night time schedule notice, color, 1972-73.

THE COURT: Which exhibit?

MR. TOPKIS: 540, your Honor. All I want to do is ~~findout~~ find out which programs were broadcast live, if any, and which were produced by CBS,if any.

MR. HRUSKA: I believe that this is not in evidence.

MR. TOPKIS: It is not in evidence yet?

MR. KRUSKA: That's the one that BMI objected to.

THE COURT: Even if it's not in evidence, it seems to me you can ask him and he can use it as a guide to refresh his recollection.

Q Using 540, then, as a guide --

A When you say live, we are going back to talking about what we were talking about this morning, that it's absolutely live, not what we call live on tape, right?

Q Well, tell me, if you will, please, sir, what is live on tape?

A Live on tape, as a general illustration, would be as we discussed -- for instance, the Carson show. There is a delay. You know, it's done in the afternoon or the evening and then shown later ~~that~~ that evening, but on tape. It's just the jargon of the trade and it's called a live on tape show.

THE COURT: It's because of its immediacy, the short period of time between the tape and the showing.

THE WITNESS: Right, but you could still edit it or do things to it.

Q How about news programs? Are they live or live on tape?

A Which of the programs?

Q Let us go through them, if we may.

Let's take the Sunday program, 6 to 7 p.m. was a program called Sixty Minutes.

A It says pretaped, so you know it was taped.

No network, so this means that we had nothing to do with that time period.

Q All right.

A Anna and the King is a half-hour film show made by Twentieth Century Fox and it failed.

Q MASH?

A MASH is a half-hour film program, Twentieth Century Fox, no further comments.

This is a successful show.

Sandy Duncan show, film program, Paramount.

Q The Dick Van Dyke Show.

A Cave Creek Enterprises, film program.

Q Mannix.

A Mannix is a film program, owner Paramount.

Q Sunday News with Dan Rather.

A It's live. It says it's there.

Q And it means it, rather than live on tape?

A Right.

Q The next?

A Walter Cronkite. That's a live feed, live program.

Now, of course, it's going to show later in another part of the country, you understand.

Q But when it originated --

A It is originated live in New York but when it is seen in California, that is a tape of that show.

Q Gunsmoke.

A CTN-owned show, film.

Q Here's Lucy?

A Film show, half-hour, belonging to Lucy Ball's compa

Q Doris Day show.

A Film program, Doris Day's company.

Q New Bill Cosby?

A Bill Cosby's company, tape. Real tape.

Q CBS late movie is, I suppose, a movie?

A Old films, right.

You are going to the next, Tuesday?

Q Right. Let me ask you one other question about the late movies.

These are movies originally made for theatrical exhibition, which you have acquired from the film companies?

A In the main, yes, sir. 95 per cent.

Maude, taped program owned by Norman Lear's company, Tandem Productions.

Q Hawaii Five-O?

A Hawaii Five-O is a cost-plus arrangement between

CBS and Leonard Freeman Productions.

Q Who is Leonard Freeman?

A Leonard Freeman is a producer who has his own producing company and this is an old arrangement going way back, known in the jargon of the trade as a cost-plus arrangement between the two of us. It's filmed on location in Hawaii.

Q CBS Tuesday Night Movies.

A They are movies made for television, made on film.

Q By?

A Various producers.

Q Not CBS?

A Might be one or two or three that are produced by CBS. The rest are produced by other companies, whether majors or independent packages.

Q When you say one, two or three, you mean in the course of a whole season?

A Correct.

Q And the late movie we discussed.

How about Carol Burnett?

A That's a tape program, Carol Burnett's company.

Q Medical Center?

A Film program, M-G-M.

Q Cannon?

A Cannon, filmed, independent producer, Quinn-Martin, independent packager.

Q What was the name again, please?

A Quinn-Martin.

Q Over to Thursday, The Waltons?

A The Waltons is a film program, independent packager, Lorimar Productions.

Q Lorimar sounds like a name made up out of somebody's names.

A Of course.

Q Who?

A Lee Rich and some other people involved as partners, and I guess they used names of children or -- typical production. Melded names.

Q Thursday Night Movies, I suppose, are like Tuesday Night Movies?

A No. Those would be feature films bought for television licensing. Theatrical films.

Q Made originally for theatrical exhibition?

A Right.

Q Coming over to Friday, Sonny and Cher.

A Tape program, independent company, Sonny and Cher's company, the name of which I can't remember.

Q Friday Night Movies?

A Also the movies made originally for theatrical showing and now appearing on television.

Q CBS had nothing to do with the original production?

A That's right.

Q Saturday night.

A Well, again, you can read it off there. The live show is the news. The same kind of feed situation.

All In The Family is a tape program, Norman Lear, again, Tandem Productions. Bridget Loves Bernie, Screen Gems, half-hour film program owned by Screen Gems, which is a subsidiary to Columbia Pictures.

Q Mary Tyler Moore?

A Owned by Mary Tyler Moore Company and it's a half-hour film program.

Q Bob Newhart Show?

A Another half-hour film program and that is also owned by the Mary Tyler Moore Company.

Q Mission Impossible?

A That's a film program owned by Paramount.

Q That takes us through the week and we can go over to the daytime schedule, about three pages ahead.

Can you take us through the daytime with similar speed and we will be done.

A The daytime schedule. If I can make one comment now, sometimes in daytime, I fade out. I don't, you know, I will make that comment -- sometimes I can't remember the exact name, who owns the show.

Q Sometimes people who watch them fade out, too?

A All right. Accepted.

Q Starting with Sunday, then.

A Well, Sunrise Semester is, I think, and I am not up that early, that's a film or a taped show. It's not live. I think. I think it's taped.

Q Who produces it?

A I don't know.

Q Archie's Fun House?

A Archie's Fun House is cartoons baught from various companies, various film companies.

Q In The News?

A In The News is a film program. It is on for about four or five minutes.

THE COURT: Let me ask a question, if I may. I have no objection to you getting into this evidence for whatever reason it is going to be relevant, but since the schedule presumably sooner or later is going to be put in evidence, do you really have to go through each item here? The document itself seems to indicate what he is telling us.

MR. TOPKIS: All I want to know really is the producer, and sometimes I can't tell whether it is a live or a film show. That's all I asked him originally to state. That is all I want.

THE COURT: Well, where not indicated as to whether live or film, will you tell us, and just tell us then the producers?

MR. TOPKIS: And if CBS produces any of them, I will be content with that.

THE COURT: That is all you are concerned with?

MR. TOPKIS: Right.

THE COURT: All right.

MR. HRUSKA: Your Honor, may I suggest that Mr. Topkis ask a specific question about the entry that he is confused about rather than put the witness to the job of reading down each one of these?

THE COURT: I understand what he wanted to ask was which of these programs is produced by CBS and, where not indicated, and most of it is indicated, will you please tell us whether it is live or film. I don't see any way to avoid going through the list to do that, but that is a relatively simple question.

THE WITNESS: I take that when it says on this form that it is live or pretaped or film, we have no problem with that, Mr. Topkis. Right?

Q Right.

A All right. I must say up front I have a problem with the soap operas during the afternoon -- during Monday through Friday. I know that we produce a couple of them. I can't for the life of me at the moment remember which ones we produce and which ones are produced by others.

MR. TOPKIS: To shorten it, there is no need to take Mr. Sipes' time if they can supply us with an identification, fine.

THE COURT: Mr. Hruska, will you see to it that we have that?

MR. HRUSKA: Yes.

MR. TOPKIS: Great. I will go on to something else.

Q. Mr. Sipes, right now CBS has three hour-length variety shows on the air each week, you testified yesterday. How many are scheduled for next season?

A. Two.

Q. In April of 1969, Mr. Sipes, CBS and ASCAP submitted to Judge Ryan the terms of a blanket license arrangement relating to the CBS ~~TElevision~~ Television Network running through December 31, 1969. Do you remember that?

A. I remember it, yes, sir, generally.

Q. Right. That was in April of 1969.

A. I don't remember exactly when.

Q. But you remember it happening.

A. Yes. I remember that something like that took place.

Q. You had a point of view as to the wisdom of that license arrangement; is that right? I am not asking you what it was. I am just asking you whether you had a point of view.

A. A point of view as to the wisdom of that deal?

Q. Yes.

A. Yes, I had a point of view.

THE COURT: I was distracted here for a moment.

Did you mention what the deal was or does he know?

MR. TOPKIS: He knows, your Honor. It is of record. I don't think --

THE COURT: But it hasn't been stated for this record yet.

MR. TOPKIS: No, but is is the deal that wound up with CBS paying ASCAP for the year 1969 $5,680,000.

Q Right, Mr. Sipes?

A That is correct.

Q Mr. Sipes, does the expression "cover your ass" convey anything to you?

A Say that again.

Q "Cover your ass."

A "Cover your ass?"

MR. HRUSKA: I object, your Honor.

THE WITNESS: I don't understand that.

THE COURT: I assume that Mr. Topkis has a serious reason for asking it.

MR. TOPKIS: I do indeed.

THE COURT: Believe me, this courthouse has heard things much more --

THE WITNESS: I don't know what that means.

Q Did you ever write a memorandum stating your position with reference to the CBS-ASCAP deal which was

submitted to Judge Ryan in 1969 in which you sought to "cover your ass"?

A. First of all, I object to that very much. Not that I recall, no, I don't. And I don't even know -- I really don't know what that means.

Q. Did you ever tell anyone in words or substance --

THE COURT: You don't need to keep repeating the phrase.

MR. TOPKIS: Right.

Q. -- that you had written such a memo?

A. I don't recall that.

Q. Mr. Sipes, is CBS using any significant number, or any, programs which are made abroad?

A. Significant number?

Q. Yes, any programs.

THE COURT: Then Mr. Topkis changed it to "any."

Q. Any programs?

A. Any programs that are made abroad?

Q. Right.

A. Occasionally that has happened.

Q. You recently broadcast the British-made Don Quixote?

A. That was made by an American company overseas.

Q. Right.

A. ~~That was~~ That was made, I think, by Universal.

Q. How about The Selfish Giant?

A. Yes, we broadcast The Selfish Giant. I think that was made in Canada.

Q. You said yesterday, Mr. Sipes, that there were some 3600 programs broadcast by CBS last year.

A. I said on an average. There were about 3600.

Q. All right, and to reach that total, you were counting each Gunsmoke episode as a separate program, right?

A. Yes.

Q. And the same is true of all other series?

A. Yes.

Q. Do you have any idea, if you didn't count separate episodes or programs of a continuing series as separate programs, what your total would be?

A. You mean, in other words, just by series alone?

Q. If you counted all the Gunsmokes as one and all the Sonny And Chers as one, and all the whatever else as one.

A. No, but I could work that out for you later.

Q. All right, fine. Perhaps you will supply it to me. No rush.

THE COURT: We are talking about the network?

THE WITNESS: Just the network.

Q Your counsel has stated, and I think in your hearing that CBS proposes here that the court order the issuance, to wit, of a per-use license, one of the features of which would be a right in ASCAP members to withdraw some or all of any particular member's compositions, right? You have heard of that?

A The right of withdrawal?

Q Yes.

A Yes, I did hear it.

Q I believe that I heard you say yesterday that you would think it necessary to exempt from that right of withdrawal spontaneous performances.

A Yes, I think I did say that, yes sir.

Q You believe that necessary in the interest of preserving accessibility to spontaneous music, right?

A Accessibility to spontaneous music? Spontaneous music has happened, it is already done with no chance -- positing spontaneous because there was no chance to set it up front or to stop it up front. So I don't know what you mean by "accessibility."

Q You want to have music available to you in case of accident, right?

A No, I want to try to find a method to solve that problem under the per-use system of spontaneous music

happening, for instance, on a news show when a band strikes up when the President is reviewing troops.

Q So that an ASCAP member would not, in this system as you see it, have a total right of withdrawal; he would have a right of withdrawal only to the extent of scheduled performances and not as to spontaneous performances?

A He would not have the right of withdrawal regarding spontaneous use, yes, I did say that, but I thought that we could solve that problem.

Q Would that extend, as you contemplate it, even to the time after a member entirely withdraws from ASCAP?

A You mean a member leaves ASCAP?

Q Yes.

A Previously to that time a song of his was spontaneously played on a news program or whatever? Is that what you are saying?

Q No, subsequent to his withdrawal from ASCAP.

A The man leaves ASCAP and he is not a member of either of the performing rights societies?

Q Right.

A And a song of his is spontaneously played?

Q Right.

A I would have to think about that too.

THE COURT: Doesn't the copyright law give you

$250 a shot or something like that?

MR. TOPKIS: Yes, but whether that would constitute, your Honor, each of the 200 stations during a CBS network broadcast is another matter.

MR. HRUSKA: That is a nice question.

THE COURT: I don't know what need there is to go into detail at this moment, but I just wanted to be sure I understood what you are talking about.

MR. HRUSKA: This is all under the assumption that this fair-use doctrine fails.

THE COURT: Correct.

Q I think you said yesterday that if CBS ~~her~~ had per-use licenses from ASCAP and BMI, and a packager or producer of a program had made his first tentative selection of music, that you would then have computers set up with all relevant information on compositions fed into those computers as to the availability of the music, the types of uses available, who could deal directly for the rights of the song that had been withdrawn from the ASCAP repertory, what the rates were that were asked if the second page of that questionnaire had been filled out and so on. Right?

A Yes.

Q And all of this information would appear -- in your construct of this world, all of it would appear on a

screen in the producer's office, and he just punches the question to a key of some kind; right?

A. Or in the music clearance department of CTN.

Q. Right. The way I can, in a sophisticated broker's office,punch a question or a quote into a machine and I will know what AT&T's last trade was?

A. I would take it so. But again, I would say that I do not hold myself out to be a computer expert, and I am not.

THE COURT: Will there be evidence from technicians as to this point?

MR. HRUSKA: Yes, your Honor, exactly.

Q. So you don't know what it would cost, Mr. Sipes?

A. I don't think it will cost much, but, no, I don't know what it would cost.

MR.TOPKIS: I have very little left, your Honor. Would it be appropriate to take a break for a couple of minutes? I think I could accellerate my cross examination.

THE COURT: All right. We will take a ten-minute recess.

(Recess.)

BY MR. TOPKIS:

A Mr. Sipes, we've seen before that under the relief which CBS seeks here in either event, if the parties can't agree on a per use fee, then the Court would set the fees. My question to you is this: Based on your experience, what factors would you expect or suggest that the Court consider in setting such fees?

A In the event that we have not been able to reach agreement among ourselves?

Q Exactly.

A Well, I think one of the factors that the Court could consider is perhaps the payout system of ASCAP and BMI itself.

Q You mean the factors that are there considered?

A I mean the system on which ASCAP and BMI pay out.

Q What do you mean by "the system"?

A Well, are you saying to me the factors that ASCAP or BMI take into account when they are paying out?

Q That's right.

THE COURT: No, no.

THE WITNESS: I'm sorry.

THE COURT: Let's start again. We have many times said in the record, even though we've only been going

two days, that there is a possibility that if your proposal was approved and you negotiated with somebody for a per use license you might not reach agreement and the Court would have to set the fee.

Mr. Topkis is asking you what factors you would suggest that a judge take into consideration in setting such a fee, and I understood you to say that among the things you think he should take into consideration would be the factors that are now taken taken into consideration or form the basis for the distributions by ASCAP and BMI, is that correct?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. TOPKIS:

Q I know what ASCAP's are. Do you know what BMI's are?

A No, I don't know what they are. I know that there is a payout system, but I don't know.

Q Would you suggest any other criteria or factors?

A Not right offhand, Mr. Topkis.

THE COURT: I want to ask the parties what they think of the idea of going upstairs and asking Judge Ryan what he thinks he would do.

MR. TOPKIS: I would be delighted. It is

always a pleasure to see Judge Ryan.

MR. HRUSKA: Would you like me to comment on that, your Honor?

(Pause.)

Q I think you said in your testimony about the per program license this morning that there were two essential reasons why it wouldn't work, and one of them was that there would be a problem as to a variety show, where ~~theree~~ there were five ASCAP compositions and five BMi compositions, that the producer might sign up four of the five ASCAP compositions and then be in a very difficult, disadvantageous bargaining position, bargaining for that fifth ASCAP composition.

Do I fairly summarize what you have in mind?

A Well, I think I went a step further than that, even. I said if he could not get that fifth, he would have to pay -- under the situation we talked about this morning, besides the four payments he had made for the four compositions he would have to make that payment to ASCAP required under that program license.

Q Right.

THE COURT: We are talking about where the network would attempt to by-pass, right?

MR. TOPKIS: No. We are talking about per

program license, your Honor.

THE COURT: I understand that. But you are not simply talking about a network taking a per program license.

MR. HRUSKA: The facts that are being questioned about relate to a proposal in which the network would take a per program license but would then attempt to secure a by-pass with regard to some elements.

MR. TOPKIS: Right.

THE COURT: That is what I meant, too. I meant it wasn't just a per program license without an attempt to by-pass.

BY MR. TOPKIS:

Q That is one of the disadvantages of following a course of per program license combined with attempts to by-pass. Check?

A Yes.

Q And the other disadvantage that you focused on was that you would, if you couldn't get the fifth composition from the member, be paying twice; you would be paying the first four people whom you had signed up and you would also have to pay the per program rate.

A Right.

Q Those are your two basis objections to the

course that we've just been discussing.

A Well, as I remember, those were the two basic factors I was talking about, I think, in that situation.

Q Okay. Now, in the situation where you are setting out to deal directly with five people, five publishers, five composers, five copyright proprietors, it would be terrible bargaining practice, would it not, based on your experience as a negotiator, to tell any of the five that you were dealing with the other four?

A Well, you say would I, if I were negotiating with one, call up the other four and tell them I'm negotiating with the first?

Q Well, I'll put it even more extremely to you. If you had signed up four, would you go to the fifth and say, "Mr. Five, I have signed up four of the songs that I need for my program. You are the last one that I need. Please suggest a fair price."

A I don't think I would do that, Mr. Topkis.

Q I don't, either.

THE COURT: Let's not be so subtle, if you call that being subtle. What I mean is that I think you are subtly approaching the point you are trying to make, and I don't see why we don't ask a direct question.

Would you run into the same difficulties in

multiple negotiations with songwriters on the per use basis that you did on the attempted by-pass of per program?

THE WITNESS: I'm sorry. Say it again. I'm sorry, your Honor. You are saying --

THE COURT: You indicated this morning that in an attempted by-pass on a per program basis you were subjecting yourself to leverage of one of the later composers because he knew that if he was the last fellow you needed he had more power than otherwise.

THE WITNESS: Right.

THE COURT: Wouldn't you run into that same problem on a direct licensing arrangement?

THE WITNESS: Not a per use. That's why I didn't understand.

THE COURT: If there were a per use system but you were attempting to deal directly with the composers, wouldn't you run into the same problem?

A You could possibly, your Honor. But there you would have the reservoir. You could pick music out of the reservoir. If you were directly licensing with a man, of course one of those people would have the right to get the best deal possible with you. If not, they could have pulled previously, so they could be out of it. They could negotiate with you or they could be in the reservoir.

But, yes, that could be a problem, but I don't see it as the same problem here.

Q It would be the same problem in a per program situation as in a per program situation where you were trying to bypass, that is, in a per use situation as in a direct licensing situation without any ASCAP license, isn't that right?

A No. I don't understand that because under the per program situation I go for -- I get four of them, or I get three of them. I'm always fighting the guy, because if I don't get all the music I'm using on there, I'm going to have to pay that fee to ASCAP, that additional fee to ASCAP.

Under the per use system, I'm paying for each use of ~~teh~~ the music, and if I don't clear a guy, I'm going to go for another guy.

Q Right.

A Right.

Q And under this situation where you can clear four and you can't clear the fifth, you are not going to put your hands over your eyes and cry; you are going to substitute somebody else for the fifth, aren't you?

A If the guy -- I take it a packager who cannot make a deal with that fifth guy will try to abandon him, if he can. Right.

Q Right.

A If he can.

THE COURT: Does it come down to this: that what you are saying is that under the present setup, if you wanted to bypass but you only got four out of five songs and you had to go to ASCAP for the fifth, you would have to pay them a full per program fee?

THE WITNESS: That's correct.

THE COURT: Whereas under the per use system you would only have to pay for that fifth song a use fee?

THE WITNESS: Yes, sir.

MR. TOPKIS: May I confer with my colleagues?

(Pause)

Q In either event, of course, you retain the right to substitute another song.

A But if I don't get one, I'm always hung with that

full payment to ASCAP, always, even though I've invested those four fees to those four other compositions of ASCAP.

Q And have you ever heard --

A And also, if BMI is in the picture for another five songs in that situation, you can double the problem.

Q Take your problem with BMI up with Miss Kearse.

A Okay. Well, those problems were my problems, whether it is BMI or ASCAP.

Q Yes.

A And together.

Q That is another lawsuit. What I am driving at is this: In any situation you always have the option of using another song, don't you?

A If you can get it, yes.

Q If you can get it. And, as a matter of fact, this same problem exists, does it not, today in the licensing of synchronization rights? That is to say, if you are the producer of a variety show and you tentatively select five ASCAP songs, five songs, ASCAP, BMI, whatever, and you want to put them on your program, and you can only get the synchronization rights to four of them, what you have to do is substitute a fifth song.

A It shows how the synchronization rights business has developed. Sure, in that situation, in that market-

place, through Harry Fox Agency you can negotiate for those synch. rights rather quickly, you can make them happen. Every now and then, if you get one where it is too much money, you won't go for that song.

Q You would go to another.

A That's right. In fact, there are some that they know about that are so expensive. There is always that happy birthday story, where people don't even go near it because the synchronization rights are so high.

Q Right.

And would you tell me, please, why you couldn't solve your problems with direct licensing of performance rights in the same fashion that you solved your problems as to the direct licensing of synchronization rights, namely by going to somebody else?

A Synch. rights are not within the purview of ASCAP or BMI. It is an arrangement made through the Harry Fox Agency.

Q I'm talking now about direct licensing. Suppose you don't have an ASCAP license, you don't have a BMI license.

A Right. I'm sorry. Give me the question.

Q Okay. You don't have an ASCAP license. You don't have a BMI license. You are the producer of a

variety show and you want to get the rights to both synchronize and perform five compositions.

A Right.

Q You can get the compositions, I gather, synchronization rights to the composition, and yet you are worried about getting the performance rights as to the fifth composition.

A No. I'm worried about getting the performance rights to all the compositions. You are talking about a direct licensing arrangement, where I've dropped my blanket license with ASCAP and BMI, right?

Q Yes.

A I'm worried about getting every one of those performance rights, Mr. Topkis.

Q I see. As a matter of fact, Mr. Sipes, if you were negotiating for performing rights in this situation that Judge Lasker and I jointly posed to you before, where you've got a per program license from ASCAP and you are doing your best by direct licensing to bypass the per program license, in that situation you've got five compositions that you want to perform and your skilled negotiator Donald Sipes doesn't close with any of the five until you've gotten quotes from all five, do you?

A So I'm leaving myself open to pay the total amount

to ASCAP because I haven't been able to clear all five? You mean I am going to juggle with all those five deals while I'm putting a show together, trying to get a show together? I don't think that is possible, Mr. Topkis.

Q Really?

A You've got to make deals. You've got to make deals.

Q That's perhaps my respect for Mr. Sipes' negotiating powers --

A Perhaps you do not understand the television business.

Q But in any event, in dealing with five people, you wouldn't close with any of the five until you had quotes from all five, isn't that right, as a matter of plain, ordinary horse trading?

A I don't know how long that is going to take me, Mr. Topkis.

Q How about --

A Really what you are saying is I'm forced to take the ASCAP per program fee and get done with it. That's what I said this morning: that I've got to pay my $2 and get moving. I've got shows to produce.

THE COURT: I'm not interested in what you think Mr. Topkis is saying, because whatever he does say doesn't

constitute evidence here. It is what you say that constitutes evidence.

THE WITNESS: All right.

THE COURT: I assume, to put it a little less flamboyantly, that your testimony adds up to the fact that if you could keep all five people waiting until you knew, that would be ideal, but that you don't think that the ideal is a realistic possibility. Is that right?

THE WITNESS: Yes, sir.

Q Mr. Sipes, going back for a minute to the question of the possible spontaneous performance of music in a situation where even though a member withdrew his rights from a per use license he still had to leave within the scope of the license the license for spontaneous performances, would you envisage that requirement as applying to the foreign performing rights societies which respectively deal through BMI and ASCAP so that they too would have to make their repertories subject to this spontaneous licensing requirement?

A Here in the United States, you are talking about?

Q Yes.

A Well, again I would think so. But perhaps,if you want me to, I can give some more thought to that. I would think so also in that situation.

Q Okay. I think, Mr. Sipes, that I heard you say this morning, perhaps it was yesterday afternoon, that you assume that there were a few other agencies than the Harry Fox Agency that broker synchronization rights. Is that your understanding?

A I don't remember when I said it. I don't remember if I meant that there were people like Bernie Brody, people like that that work for packagers and clear synch. rights. Whether they do it through the Fox Agency or whatever, I don't know.

Q You just don't know whether there is anybody or any agency other than the Fox Agency that clears synch. rights.

A I am not sure.

Q Okay. Fine. Now going back one last time to that conversation you had with Mr. Finkelstein, I think you testified at your deposition that you were horrified at the $6 million figure that he proposed, is that right?

A I think I used that term, yes.

Q What would have been your reaction to a proposal of $3 million?

A For a blanket license?

Q Yes.

A Well, it is very hard for me to bring myself back

to that moment in time and decide what I would have felt then, Mr. Topkis.

Q Well, would you speculate a little for me?

A Speculate as to how I would have felt at the time that I had that meeting?

Q Right.

A I would have felt better than the $6 million.

THE COURT: Some light wouldn't be cast on the case even if they had been offered something for $200,000.

MR. TOPKIS: Only this: that there had been extensive testimony at the depositions that so far as CBS is concerned this is a matter of principle and not of money. Like Winston Churchill testing the lady, I want to find out.

MR. HRUSKA: Your Honor, I object.

THE COURT: I found it rather interesting to read that, but even when I read it I didn't understand what difference it makes about the motivation of the parties here.

MR. HRUSKA: That's true.

THE COURT: At least it will have to be pointed out to me. I am being asked to determine whether there is -- whether the present arrangement is (a) legal and, as part of that, whether a new arrangement is feasible.

I don't see that that depends on the personal motivation of the parties.

MR. HRUSKA: And in terms of characterizing, I think it is fair in context to say that those depositions were really talking about a matter of business principle.

THE COURT: Yes, I understand that.

MR. TOPKIS: I have no further questions. Thank you, Mr. Sipes and your Honor.

THE COURT: Miss Kearse, do you have any questions?

MISS KEARSE: I have a few questions, your Honor.

CROSS EXAMINATION

BY MISS KEARSE:

Q Mr. Sipes, I will confess, your answers to some of Mr. Topkis' questions have left me a little bit confused.

With respect to obtaining synchronization rights, I believe you testified that if you could get the rights to four of the five compositions you want but could not obtain rights to the fifth, you would find another composition to which you could get synchronization rights. Is that correct?

A I'm sorry, Miss Kearse. I thought I said that if a packager; a packager has to clear synchronization rights for all the music on his show and if you can't clear the rights, he is in big trouble.

Therefore, he has got to find another piece of music to clear. I mean, he can't go with a piece of music on a show that he doesn't have synch rights to.

Q Suppose there is one composition as to which CBS cannot get synch rights for Gunsmoke. What does CBS do?

A I think we would have to find another piece of music. We couldn't record the piece of music onto the program.

Q Suppose CBS were trying to get performance rights for Gunsmoke and as to one composition it could not get the performance rights. What would CBS do?

A Well, what system am I under when I am trying to get performance rights? I am not trying to get performance rights now because I have a blanket license.

Q Any system.

A I can't answer that. I would like to know the system.

Q Let's start with the system in which there is no license from either performing rights organization.

A You mean I have dropped my ASCAP and BMI licenses, and NBC and ABC have retained them and I am trying to directly license or bypass, as we called it?

Q Does what you would do depend on whether or not ABC and NBC have licenses?

A I am just trying to get the picture of the world, Miss Kearse. I'm sorry. I am just trying to see the situation, to see how I would react to it.

Q The question is what you would do if CBS had no license from either ASCAP or BMI and there were a situation in which for Gunsmoke there was one composition to which you could not obtain performing rights.

A I could not obtain performance rights under that system. I would have to try to get another composition. I would have to try.

Q Isn't that true under any system?

A Not under a blanket license system, no. It's not true under any system. I don't have to do that under a blanket license system.

Q Is that the only system as to which you think that would not be true?

A I don't know of any systems that could be posited by you.

THE COURT: Per use?

A I would have to get music performance rights, either out of the reservoir or, if the man had pulled, we, I would have to get the rights.

I am not denying the fact that I would have to get music performance rights for those compositions on any program, one way or the other.

THE COURT: Can you give us an example, Mr. Sipes, of the difference between the performance rights for a song on Gunsmoke and the synch rights for a song on Gunsmoke?

THE WITNESS: Sir, as I said, the synch rights, and again, I am not a technician, you know, but the synch rights are just where you pay a fee to have that music recorded on that piece of, or with that piece of film or tape.

That is a synch right as far as I know it in general terms. I am sure people here are much more qualified --

THE COURT: Is it recorded simply by transferring

the record onto this tape from another record?

THE WITNESS: Or that it's recorded by the orchestra in synchronization with the piece of film.

THE COURT: All right. Now, how does that differ from a girl singing a song on Gunsmoke?

THE WITNESS: Well, that's a performance of that song on the screen when you watch, when you tune your set up.

THE COURT: In other words, in the one situation she is being photographed as well as being recorded?

THE WITNESS: Right.

THE COURT: In the other case, the music is pre-recorded?

THE WITNESS: It's the pure mechanical process.

THE COURT: It is important for me to understand this distinction, which it is obvious that I don't, at the moment, and I don't know whether the best way is to get a witness to tell me about it or for counsel to agree on some statement on this point.

I don't want to hold up the proceedings. Did you hear my remarks, Mr. Topkis?

MR. TOPKIS: Yes, ~~Idid~~ I did, indeed, your Honor.

THE COURT: Excuse me, Miss Kearse. Go ahead.

Q Mr. Sipes, you have testified previously that to the best of your knowledge, CBS has never tried to get a

direct license from a writer or publisher, is that correct?

A To my knowledge.

Q And to the best of your knowledge, what is the reason for that?

A Because we have a blanket license.

Q Did you have a blanket license from BMI starting January 1, 1970?

A Well, I don't know what took place under the courts for us to continue. I don't know the answer to that, Miss Kearse.

Q Are you familiar with the letter which was sent by CBS to BMI, which has been marked as PX 200? This is the letter dated December 19, 1969.

A Well, is that Mr. Woods' letter?

Q That is his letter.

A Yes.

Q Let me read the first sentence of the letter.

"The music performing rights licenses now offered by each of your organizations to the CBS Television Network are due to expire December 31, 1969."

Were you aware that that was to occur?

A Yes.

Q Did you -- by you I mean CBS -- reach agreement with BMI for a new license to start January 1, 1970?

A No.

Q So that, starting January 1, 1970, CTN was not licensed by BMI, is that correct?

THE COURT: Well, counsel agree to that, don't you, Mr. Hruska? You weren't licensed?

MR. HRUSKA: There was no license; right, your Honor.

THE COURT: Well, whatever the difference is escapes me.

MR. HRUSKA: The distinction is that under the doctrine of copyright misuse we would take the position that as of January 1, 1970, this goes back to the argument of BMI in the preliminary injunction motion; as of that date, BMI was misusing the copyrights in its pool but there was no license.

That is the distinction.

THE COURT: Well, that has become moot but whether it was true at the time doesn't mean that you were licensed.

MR. HRUSKA: That's right. There was no license. There was no obligation to pay, it is our position, but there was no license.

THE COURT: I understand that but we are agreed and, if not, I think I would have to rule, that CBS was not licensed to use BMI's music for a period in 1970 and

thereafter it did secure a license subject to the order issued by the Court; isn't that right?

MISS KEARSE: Yes, your Honor.

Q Mr. Sipes, during, let's say, the first 6 months of 1970, did CBS attempt to get any direct licenses from writers and publishers for performances of music on CTN?

A No, it did not; not to my knowledge.

Q I am specifically referring to writers and publishers who are affiliated with BMI.

It did not, is that correct?

A It did not, as far as I know.

THE COURT: You keep saying this to be safe but is there any reason to believe you would not know?

THE WITNESS : No. I will go out on a limb, your Honor, but no.

Q At that time, during the first 6 months of 1970, were you familiar with the concept of music in the can?

A Yes.

Q Were programs being put in the can during that period of time?

A Yes.

Q In fact, programs were being put in the can continuously, all the time, weren't they?

A Yes.

Q And did these ~~prog-ams~~ PROGRAMS that were being p[illegible] in the can contain music that is in the BMI repertory?

A I would think so, yes.

Q Mr. Sipes, has CBS had any dealings with respect to music performance rights with any of the writers and publishers who are named as defendants in this action?

A I'm sorry. I would have to see the list of writers and publishers.

What was the question? Maybe I could answer it.

Q Has CBS had any dealings with respect to music performance rights with any of the writers or publishers who are named as defendants in this action? I will show --

A I would think not, since we have not had any dealings for music performance rights, so I think I could say without taking a look.

Q Can you tell me how CBS came to choose those particular writers and publishers to be defendants in this action?

A No, I can't.

Q Do you know who selected the writers and publishers to be defendants in this action?

A I do not.

Q Have you ever had any discussions with anyone as to who should be selected to be defendants?

A ASCAP and BMI.

Q You had discussions with ASCAP and BMI?

A I mean that was the basis of what we are talking about but, beyond that, no.

Q Yesterday, you testified that it was your belief that writers and publishers would be reluctant to deal with CTN directly; is that correct?

A Yes.

Q You also testified to the basis of that belief. Did you tell us the entire basis for your belief?

A I don't know what you mean by the entire basis of my belief.

Q Well, you were asked what the basis for your belief was. Did you give a complete answer to that question?

A I think I did.

MISS KEARSE: Your Honor, I think my next question really is addressed to Mr. Hruska, since it deals with what the CBS proposal is with respect to --

THE COURT: It is about time for another question like that.

MISS KEARSE: With respect to Plaintiff's Exhibit 860, which has been marked for identification, there is a space for listing of names, addresses and telephone numbers of persons authorized to negotiate an issue of performance rights license for the above entitled compositions.

What I would like to ask Mr. Hruska is whether CBS proposes that there be any restrictions as to who could be designated.

MR. HRUSKA: It seems to me that the copyright proprietor ought to be free to designate anybody he chooses to designate, to deal directly in performance rights for his music. That could be, I would imagine, either somebody on the staff of a publishing company, an agent who might deal for half a dozen or a dozen publishing companies, or a clearing house operation like Harry Fox.

Does that answer your question?

MISS KEARSE: It raises another question, and that is whether the end of the statement was intended to limit the first part of the statement.

THE COURT: Please don't get me confused or more confused.

I gather that you are saying that CBS is not proposing to limit the persons who can be designated by a composer, author or lyricist or publisher to negotiate on his behalf. Is that right?

MR. HRUSKA: I think that is right, your Honor.

THE COURT: I am not trying to entrap you.

MR. HRUSKA: I am not sure I understand the question. Obviously, it would be to the interest, we feel, of

everybody involved in the functioning market that these be serious, good faith designations.

THE COURT: I understand. That is a separate question and it would be a lot easier if you could do all your business with 3 people instead of 3000.

MR. HRUSKA: Not necessarily.

THE COURT: Well, then, 3000 rather than 3, but you are not quoting that part of the proposal, as I understand it.

MR. HRUSKA: Well, I think we can eliminate ASCAP and BMI. I mean, there was a suggestion, for example, this morning that Mr. Finkelstein might be designated by everybody to deal for his music.

Obviously, that would be a sham; we would be back where we started with ASCAP and BMI, with them negotiating for all the copyright proprietors.

THE COURT: Then you propose to exclude ASCAP and BMI and those persons who have been actively involved in licensing or what you want to --

MR. HRUSKA: Not people who have been actively involved in licensing. Some people who --

THE COURT: I mean at those organizations.

MR. HRUSKA: Well, if Mr. X, a long-time ASCAP employee, went out and set himself up in business and ended

up representing a half a dozen publishing companies, we wouldn't exclude that, no.

What I am getting at is, the only thing we would exclude here would be a sham substitute for the very system we are trying to make more competitive.

THE COURT: I don't want to let my nod be accepted, and I am sure Mr. Hruska doesn't, as indicating that I necessarily agree with your analysis of Mr. Pinkelstein's status, but I do understand your attitude on the subject.

MR. HRUSKA: That's why I shifted to Mr. X.

THE COURT: I don't think we should put him out to pasture.

MR. HRUSKA: Neither do I.

Q Mr. Sipes, in answer to a question of Mr. Topkis, I believe you stated that under a per use system you would expect program packagers to come to CTN already having acquired performing rights to music; is that correct?

A Well, I think I said that I would expect packagers who are delivering programs to me to deliver with those programs all elements, including music performance rights.

Q Have you ever discussed this expectation with a program packager?

A A program packager?

Q Yes.

A No, not that I can recall.

Q Mr. Sipes, who is Richard Jencks?

A ~~Richard~~ Richard Jencks is the CBS vice-President in Washington.

Q Do you recall what his position was in 1969?

A If I am not mistaken, in 1969 Mr. Jencks was, I think, called Group President; Group Broadcast President.

Q President of the CBS Broadcast Group?

A Okay.

Q Did you ever speak with Mr. Jencks about the CBS per use proposal?

A I can't recall. Normally, I would talk with Mr. Wood, who was my superior, and Mr. Wood at that time would have reported to Mr. Jencks.

I honestly can't recall whether I spoke to Mr. Jencks myself. In the normal course of events, I would have talked to Mr. Wood and Mr. Wood would have talked to Mr. Jencks.

Q Can you tell us when CBS first decided to ask for a per use license from either BMI or ASCAP?

A I'm sorry. When what?

MISS KEARSE: Can you read it?

(~~REcord~~ Record read.)

A When they first decided? I don't think I could remember when it was first decided.

Q Well, do you remember whether it was prior to 1969?

A Whether it was prior to 1969?

Q Right.

A I don't really recall. I don't know.

Q Do you recall if it was not prior to 1969?

THE COURT: Excuse me. Can you recall how long it was before you actually did ask that you first decided you would?

THE WITNESS: Well, deciding when we would ask, your Honor, that must have been sometime in 1969, not 1968, I would think, and again, I am a little blurry but I would think it was sometime in 1969.

Q Prior to making that decision, did CBS hire an economist to advise it on this subject?

A Well, I am going to speak for CTN but not to my knowledge, no.

Q Did CTN hire a music consultant to advise it?

A No.

Q Mr. Sipes, when the program packager obtains a direct license from a writer or publisher, is it your expectation that he will obtain that license on a per use basis?

A Well, what do you mean by on a per use basis? That he would obtain it from the copyright owner on a per use basis or obtain it through the per use system.

Q I mean obtain it directly with payments made on a per use basis.

A I would think that that would be a right of the packager, yes, to go out and directly license people.

THE COURT: I don't think that was the question. The question was would you expect him to do that.

THE WITNESS: I would expect him to do that, yes, I would, and I would expect that to happen more and more as the system developed and the marketplace developed; yes.

Q My question really was would you expect him to do that on a per use basis.

MR. HRUSKA: I'll object, now, your Honor, because I think the question is demonstrably vague.

I think there is an obvious failure of communication here and perhaps Miss Kearse could clear it up by defining in this particular context what method of payment she means to encompass within the question.

THE COURT: Well, I don't find it very vague, myself, but the real question is whether Mr. Sipes did.

Did you understand the question?

THE WITNESS: Not the per use basis.

THE COURT: Explain what you mean by using the phrase, per use, in that.

MISS KEARSE: I thought Mr. Sipes was the expert

on per use.

THE COURT: He is, but not the expert on Miss Kearse's questions.

MISS KEARSE: I am using it in the same sense in which he is using it.

THE COURT: Well, am I correct, then, in understanding, Miss Kearse, that your question is if the per use system went into effect, would Mr. Sipes expect packagers to attempt to and regularly go to the proprietor of the copyright and to try and work out a deal, as you put it, to use a particular property for one use and make one payment?

Is that what you are asking?

MISS KEARSE: Or for payments which are related to use.

THE COURT: Or for multiple use.

THE WITNESS: Yes, sir. He could not do it for one use because then he is stuck and is in bad trouble.

Again, I would leave that to the ingenuity of the packagers but I would expect possible something like that to happen, yes. But I think that packagers have ingenuity and they deal with all alements and they make different kinds of deals and I would leave it to them.

Q As to programs that are produced by CTN, would you expect any licenses which you obtained directly from

writers and publishers also to be on a per use basis?

A As we have just discussed it, yes, I think I would.

Q Do you expect that those licenses would be made on other than a per use basis?

A I don't know. That would be the exigencies of the market place. I don't know.

I couldn't tell you now what other kinds of deals might or might not develop.

Q In this lawsuit, would you be willing to have CTN limited to obtaining licenses directly only on a per use basis?

A You mean limit now the kind of negotiations that could go on in the future between copyright owners and CTN or a packager? Is that what you mean, to limit now what we don't know what develops in the future?

I don't see why that should be. Why anybody would want to place themselves in that position -- perhaps copyright owners later on would like a different type of deal. I don't know.

Q Is the answer to the question that you don't know?

A The answer is I don't think anybody should limit themselves to that for a future that is going to develop. Who knows?

MISS KEARSE: Your Honor, I don't think my question

has been answered.

THE COURT: Well, I get the answer to your question to be no, that CBS does not propose to limit itself to per use licenses.

MISS KEARSE: I did want it clarified.

Can I have that from the witness, your Honor, if that is what the witness means? If the witness means "no," could we have it on the record?

THE WITNESS: The answer I would give is that I don't think it's right to limit now --

THE COURT: You weren't asked that. You were asked whether CBS would be willing to be limited as part of the proposal. Again, Miss Kearse, I think this is really a question that has a matter that we should put to Mr. Hruska.

MR. HRUSKA: Yes, your Honor. This certainly is my initial reaction on it. I suppose, and this is true, I think, of every aspect of this per use system -- I have got to qualify anything I say, your Honor, because if there were ever a point of view presented as to why a particular limitation or condition would seem sensible and appropriate, we would have to consider that. But that's why I say my initial reaction is that it makes no sense to have such a limitation and, therefore, I would propose as part of this system that there be no such limitation.

THE COURT: All right.

Q Have you read the deposition testimony of Dr Stanton in this case?

A No. I don't think so. I don't remember it.

Q At page 239, line 21, of Dr. Stanton's deposition transcript, the following question and answer appears:

"Q My question really is a more basis one. Would you confine yourself to per use contracts with such music publishers?

"A Yes."

Mr. Sipes, who speaks for CBS -- Dr. Stanton or yourself?

A I think that Dr. Stanton and I on that particular point, have a difference and when you say who speaks for CBS, Dr. Stanton, by the way, as of this moment, is a consultant to CBS and is not an operating officer of CBS.

THE COURT: Well, let me make this comment. First of all, of course, Dr. Stanton was the president of the network or the company at the time that he was deposed and --

MR. HRUSKA: No, your Honor.

THE COURT: Was he not?

MR. HRUSKA: He was vice-Chairman of the Board.

THE COURT: Excuse me. Whatever it was, his position --

MISS KEARSE: He was chief operating officer, I believe the deposition says.

THE COURT: I take that into consideration. At the same time, when it comes to the business of what CBS's proposal is, Miss Kearse, I think that we must follow a consistent line and the consistent line that I believe is the only appropriate one is for these spokesmen in Court for the company to state what that position is, namely, the counsel, and where there are apparent discrepancies between the various expressions on the part of witnesses for CBS, we will have to get Mr. Hruska's reconciliation as to the statement or statements as to what the position is.

Mr. Sipes, in July of 1970, in response to a motion made by BMI, CBS submitted to the court affidavits of several individuals including one Robert H. Precht. Attached to Mr. Precht's affidavit was a copy of portions of what he represented as a contract with CTN.

I would like to show you that.

MISS KEARSE: May I have this marked BX161, your Honor.

THE COURT: Yes, just bring it up.

MR. HRUSKA: Your Honor, may I ask a question at this stage related to that question or this offer of the exhibit?

THE COURT: Well, it hasn't been offered. It's being marked, as I understand it.

MR. HRUSKA: Are we all operating under the same ground rule, that documents used on cross examination ne -- may I say that notice of documents to be used on cross examination need not be given to opposing counsel.

THE COURT: I think there ought to be a uniform rule, and I am willing to accept all rules satisfactory to all counsel, and if they are not, I will have to hear the parties.

MISS KEARSE: The present ground rule specifies that that designation is to be made with respect to ex

party's case in chief.

MR. HRUSKA: That is true. There is no present ground [illegible] cross examination.

THE COURT: I can understand the reason for the difference, and the answer seems to be yes.

MR. HRUSKA: I am perfectly content to abide by that ground rule if that rule be uniform.

THE COURT: It will.

(BX161 marked for identification.)

THE COURT: Miss Kearse, can you tell us who Mr. Precht describes himself as being?

MISS KEARSE: He describes himself as being the producer of the Ed Sullivan Show.

THE COURT: All right.

Q Do you want time to read that over?

A I would appreciate it.

(Pause.)

Q Mr. Sipes, was the Ed Sullivan Show a live on-tape show?

A Very early in its career it was a live show, as I remember. It was a very old show that went on for many, many years.

THE COURT: Are you asking as of 1969 or 1970.

MISS KEARSE: As of the date of the affidavit, 1970.

THE WITNESS: I would think, your Honor, that at that time it was a ~~tapeshow~~ tape show.

Q. Are the provisions which are annexed to Mr. Precht's affidavit provisions which typically appeared in contracts of CTN for live on-tape shows?

A. Let me be blunt and tell you that it's been many a year since I have looked at an overall long-form contract. I leave that to the attorneys. I make a deal. I don't get into the contract, ~~Mi-s~~ Miss Kearse.

I don't read over -- I don't read the long-form contracts. I have people working in the department who do that. I haven't done that, I haven't read a long form contract in years.

Q. So you answer is you don't know whether or not this was typical?

A. Yes, I would have to say that.

Q. Do you have any reason to believe it was not typical?

A. I have no reason to believe one way or the other.

Q. Do you have any belief with respect to CTN contracts dealing with filmed shows?

A. Say that again.

(The pending question was read.)

A. Well, it's the same thing, you know. I make a deal

and then I am off to the next deal. Then people in my department and the lawyers work out the long-form contract. I don't get into them.

Q Do you know whether or not CTN generally obtains indemnification rights ~~fromproducers~~ FROM PRODUCERS with respect to compositions, the performance of which is not licensed through BMI or ASCAP?

A I think so, but I don't know.

THE COURT: You mean indemnifications from a packager against any claims by the owner?

MISS KEARSE: Of the copyright, yes, your Honor.

Q Mr. Sipes, let me step back a few steps.

You said that you had not read Dr. Stanton's deposition in this case?

A I said that I didn't remember if I did. I don't remember.

Q My recollection is that you said you had not when I asked you just a few minutes ago.

A If I did say I had not, perhaps I was mistaken. Maybe I read it a long time ago.

Q I would call your attention to page 32 of your own deposition in this case in which you said you had read Dr. Stanton's deposition.

A Then if I said it in the deposition, I did.

MISS KEARSE: Your Honor, I wish to offer BX161 for identification into evidence, and it is just this.

THE COURT: The marked sheet?

MISS KEARSE: Just the marked sheet. It is several pages but --

THE COURT: The rest of it is in the record anyway. I don't see any reason to take it all apart. All you are telling me is what you want me to consider.

Do you have any objection to it being introduced into evidence at the trial itself?

MR. HRUSKA: Your Honor, I really haven't had a chance to even read this.

THE COURT: Why don't you let Mr. Hruska give me his views in the morning, if he has any objection?

Mr. Topkis, you of course have the right to express an objection, but I assume it's probably not of interest to you.

MR. TOPKIS: I rarely disagree with Miss Kearse, your Honor.

MISS KEARSE: I see it's after 4:15, your Honor. I do have some more questions.

THE COURT: Let's go to 4:30, if you don't mind. Is it all right with you?

MISS KEARSE: It's fine with me. Maybe I can

finish by then.

THE COURT: I am not holding you to it. We will just get that much more out of the way.

Q Mr. Sipes, in answer to a question put to you by Mr. Hruska, with respect to CTN's practical need for a writer or publisher's cancellation rights to be exercised on notice, you stated, and I am reading from page 60 of yesterday's transcript, line 5. "Well, you have packagers and producers of programs who are putting their shows together. They get their musical compositions, and then they nail down the other elements, perhaps in a feature performance or variety show around those compositions. Now, to have a situation whereby a packager would, for instance, rely on a musical composition being in the per-use system Monday and he goes forward that Monday getting scripts, hiring talent, getting a commitment from people to build sets, committing himself and then having the musical composition pulled, say, on a Tuesday, the next Tuesday, gives a serious problem to us with that situation."

In that testimony, were you testifying as to the typical situation that occurs?

A Well, I would have to give -- I am foreshortening things, naturally. I don't want to speak for packagers or producers. I think they can speak for themselves. I said I am

not a producer. I am giving you a general idea of how the variety shows are produced.

Generally, in musical variety shows, you have a blend of all the elements. YOu have to have a musical composition, and you have to know what your sets are for that musical composition if you are going to do a production number with it. You have to hire your dancers, et cetera, and get your costumes and you are building something which involves a particular performance, a particular feature performance.

-Q My question was whether you were describing a typical situation.

A I don't know if the word "typical" -- I was providing a general situation.

Q A general situation?

A A general situation.

Q In other words, you were not describing an aberrational situation in order to illustrate CBS's need for notice on the cancellation right; is that right?

A I am saying CBS or a packager.

I don't think I am giving you an aberrational situation, no.

Q Mr. Sipes, you testified yesterday that you had several conversations with BMI during 1969 and I believe you said those conversations were with Mr. Edward ~~Kramer.~~ Cramer.

A. Yes, I had conversations with Mr. ~~Kramer~~ Cramer.

Q. You were asked what the subject matter of those conversations was.

Would you tell us again what the subject matter of the conversations was?

A. The subject matter of those conversations was a new license deal, blanket license deal with BMI.

THE COURT: When you say new, again you mean a renewal offer?

THE WITNESS: That BMI requested that we meet with them to talk about a new -- we had an old deal -- to talk about a new deal for a blanket license with BMI.

Q. Was that the only subject matter of those conversations?

A. ~~Well~~ Well, I must say I think there were general complaints about the past and there was social conversation. Things like that happened, also, general complaints by BMI about the past.

Q. To what are you referring?

A. I am referring, I think, and again I am giving it to you in generalities, I am not -- I don't remember exact wording -- that BMI through Mr. ~~Kramer~~ Cramer expressed unhappiness with the way he felt that BMI had been treated by CTN in the past.

THE COURT: So the complaints were expressed by BMI, not CTN?

THE WITNESS: That is correct, your Honor, in that situation.

Q Mr. Sipes, did you initiate the first meeting with BMI?

A It is my recollection that the first meeting was set up by Mr. ~~Kramer~~ Cramer. Now, that is again my recollection.

Q And in fact wasn't it the BMI complaints about the past which were the main topic of conversation?

A I can't really tell you whether it was the main topic, Miss Kearse. It was a topic.

Q How many meetings with Mr. ~~Kramer~~ Cramer did you have during that period?

A Several, and I don't think I could pin it down much more than that. There were several.

Q As many as six?

A I can't say. I don't remember.

Q As many as fifteen?

A I don't know. That seems a little high to me.

Q Was anyone else present at your meeting with Mr. ~~Kramer~~ Cramer?

A Again, It would depend upon the meetings. Certain

meetings there were other people from ASCAP whose names I don't recall -- not ASCAP, I am sorry -- BMI. There were other people from BMI present at some of the meetings, and I know at one point that Mr. Appel was with me in one or two meetings I had, I think, with Mr. Kramer. There may have been others.

Q Will you tell us as nearly as you can recall what Mr. Kramer said to you at any of those meetings? And start with the earliest one you can recall, and if you can give it to us in some kind of chronological order.

A I can't in chronological order. I can tell you that the substance of the conversations that I had with Mr. Kramer covered basically his complaints about the past and also that he wanted a new blanket license with CTN.

Q Did he say anything else?

A Well, I don't know what you mean. He discussed with me a new license that he would like BMI to enter into with CTN; thathe wanted parity with ASCAP; that he felt that more and more of the music that was being used was BMI music; that BMI music was the new music or the music of the new age, and that was the reason he wanted parity with ASCAP; that his music was growing all the time and would continue to grow and, as I say, a series of complaints about past treatment of BMI as far as CTN was concerned.

Q Did Mr ~~Kramer~~ Cramer use the word "parity"?

A My recollection is that he did use the word "parity," yes.

Q Did Mr. ~~Kramer~~ Cramer mention any specific dollar amount which BMI ~~received~~ requested?

A Well, I can't -- no, I don't think so. He led me to believe, me to believe, in my meetings with him that he wanted parity with ASCAP, and what he meant by that, to me, was that he wanted the same money that ASCAP would get, that they would make with CTN.

Q I'm interested in what Mr. ~~Kramer~~ Cramer said primarily rather than how you felt inside.

A How I felt inside is based upon what he said to me, Miss Kearse.

THE COURT: Miss Kearse is only asking you to report what you recall Mr. ~~Kramer~~ Cramer saying.

THE WITNESS: Well, I think I've stated that: that he wanted parity, that his music was growing more and more.

THE COURT: All right. She also asked you before, and I assume from what you said that the answer to it is no, whether Mr. ~~Kramer~~ Cramer named a figure.

THE WITNESS: No, he did not, your Honor.

Q Did you tell Mr. ~~Kramer~~ Cramer that ASCAP was asking you

for $6 million for a blanket license fee?

A I don't recall. I told him that ASCAP had been talking to me. That I told him.

THE COURT: As a good negotiator, I would not have supposed you told him that if you thought it was a high figure.

Q By the way, Mr. Sipes, who initiated your conversations with ASCAP with respect to blanket license?

A Well, again, as far as I can recollect then, I think the CBS lawyers called me and said, "We want you to go with us. We want you to come with us for a meeting at ASCAP regarding a new blanket license arrangement." That's as far as I can remember how that meeting occurred.

Q Do you know whether that meeting was arranged at the behest of CBS?

A No, I do not know. I do not know.

Q Do you know to the contrary?

A I do not krow.

THE COURT: This is as good a time as any for us to stop if it is all right with you, Miss Kearse.

MISS KEARSE: Fine, your Honor.

THE COURT: Very good. We will adjourn to ten o'clock tomorrow morning.

There is no need to see counsel ahead of time,

is there? I will see you, then, at ten o'clock.

(An adjournment was taken to Thursday, May 3, 1973 at 10 a.m.)

- - -

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

MORRIS I. KLIGMAN
SIMON A. LUBOW
LURE J. OWENS
IRVING WOHL
MICHAEL MARDINEY
EDWARD A. BARRON
JOHN H. KNUPPEL
GEORGE WOLF
JACK GREENBERG
MURRAY PADGUG
ARTHUR RUSSELL
MORT COHEN
MURRAY DEUTSCH
JULIAN WOLF
EDWARD E. ODETTE
ROBERT G. MAIRE

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TASCIONE
EUGENE A. LEVINE
G. RY WEISSBROT
JOHN BENOLT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

Date	Page	Line(s)	Error	Change To
May 2	129	18	of the	of their
	129	19	after trial	after the trial
	129	22	authenticity after	authenticity after

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

MORRIS I. KLIGMAN
SIMON A. LUBOW
LUKE J. OWENS
IRVING WOHL
MICHAEL MARDINEY
EDWARD A. BARRON
JOHN H. KNUPPEL
GEORGE WOLF
JACK GREENBERG
MURRAY PADGUG
ARTHUR RUSSELL
MORT COHEN
MURRAY DEUTSCH
JULIAN WOLF
EDWARD E. ODETTE
ROBERT G. MAIRE

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TASCIONE
EUGENE A. LEVINE
GARY WEISSBROT
JOHN BENOIT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

Date	Page	Line(s)	Error	Change To
May 2	132	13	th e	the
	132	19	direct	directly
	133	6	by CBS	by the CBS
	133	15	option	options
	135	6	Who	Why
	138	14	program	per-program
	138	14	fromASCAP	from ASCAP
	139	23	only	already
	140	10		delete "Are you"
	140	18	I,	with "I"
	143	2	believe	believe so
	143	4	in the 4A	in 4A
	145	4	days'	days
	145	20	gtgot	got
	145	23	4(1)	4(A)
	147	4	same.	same one.
	147	22	pay me my	pay my
	149	7	he has now	he now has
	151	24	leave cover-age	leave the coverage

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

MORRIS I. KLIGMAN
SIMON A. LUBOW
LUKE J. OWENS
IRVING WOHL
MICHAEL MARDINEY
EDWARD A. BARRON
JOHN H. KNUPPEL
GEORGE WOLF
JACK GREENBERG
MURRAY PADOUG
ARTHUR RUSSELL
MORT COHEN
MURRAY DEUTSCH
JULIAN WOLF
EDWARD E. ODETTE
ROBERT G. MAIRE

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TABCIONE
EUGENE A. LEVINE
GARY WEISSBROT
JOHN BENOIT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

Date	Page	Line(s)	Error	Change To
May 2	155	2	copy right	copyright
	156	7	to some	with some
	157	14	not study	no study
	157	25	about	about it
	158	13	compensation	competition
	160	21	was	were
	161	14	performed	Performed
	166	11	broblems	problems
	167	5	a progrom	a per-program
	171	22	to Harry	to the Harry
	172	7	that Harry	that the Harry
	172	22	Marlen	Marlene
	176	8	Didyou	Did you
	178	3	197o	1970
	178	9	arose	which arose
	178	20	year after	year before
	179	18	Not rating.	Not ratings.
	180	19	Mr. Woods'	Mr. Wood's
	181	21	tear	year

MORRIS I. KLIGMAN
SIMON A. LUBOW
LUKE J. OWENS
IRVING WOHL
MICHAEL MARDINEY
EDWARD A. BARRON
JOHN H. KNUPPEL
GEORGE WOLF
JACK GREENBERG
MURRAY PADGUG
ARTHUR RUSSELL
MORT COHEN
MURRAY DEUTSCH
JULIAN WOLF
EDWARD E. ODETTE
ROBERT G. MAIRE

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TASCIONE
EUGENE A. LEVINE
GARY WEISSBROT
JOHN BENOIT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

Date	Page	Line(s)	Error	Change To
May 2	185	6	heard	have
	185	6	comercials and	commercials in
	185	7	that started	that staggered
	185	25	could is	could do is
	188	3	on air	on the air
	191	7	and a/direct licensing law	in a direct licensing world
	192	17	Those things happen. They happen.	Q. Those things happen. A. They happen.
	193	13	defensive	defenses
	193	17	chance.	chances.
	195	22	think that	think that that
	196	20	havee	have
	198	19	iimpression	impression
	208	10	I heard	I have heard
	210	15	REcord	Record
	211	12	do...formula as	use...formula for

MORRIS I. KLIGMAN
SIMON A. LUBOW
LUKE J. OWENS
IRVING WOHL
MICHAEL MARDINEY
EDWARD A. BARRON
JOHN H. KNUPPEL
GEORGE WOLF
JACK GREENBERG
MURRAY PADGUG
ARTHUR RUSSELL
MORT COHEN
MURRAY DEUTSCH
JULIAN WOLF
EDWARD E. ODETTE
ROBERT G. MAIRE

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TASCIONE
EUGENE A. LEVINE
GARY WEISSBROT
JOHN BENOIT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

Date	Page	Line(s)	Error	Change To
May 2	214	19	or	for
	217	7	an d	and (no space)
	220	6	I/ever say	I ever saw
	222	3	CRN	CTN
	223	2	fiture	figure
	228	12	reaally	really
	229	11	possible	possibly
	230	4	an	and
	231	8	kin d	kind
	232	17	Madam	Madame
	241	9	oth	both
	242	5	are	you
	243	6	REally	Really
	246	6	th e	the
	249	6	being	buying
	249	24	guy	buy
	250	12	i	I
	252	9	agin	again
	255	22	program	per-program

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TABCIONE
EUGENE A. LEVINE
GARY WEISSBROT
JOHN BENOIT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

...RRIS I. KLIGMAN
...MON A. LUBOW
...EE J. OWENS
...VING WOHL
...CHAEL MARDINEY
...WARD A. BARRON
...HN H. KNUPPEL
...ORGE WOLF
...CK GREENBERG
...RRAY FADDUG
...THUR RUSSELL
...RT COHEN
...RRAY DEUTSCH
...LIAN WOLF
...WARD E. ODETTE
...BERT G. MAIRE

Date	Page	Line(s)	Error	Change To
May 2	258	17	thatmany	that many
	260	5	document	doctrine
	261	6	proved	pulled
	263	24	payments over the perform-ances	payments in excess of performance payments
	264	16	findout	find out
	265	12	hat	that
	273	4	thathe	that he
	274	11	TElivision	Television
	275	21	courthousehas	courthouse has
	276	6	mans	means
	277	2	t hat	that
	280	13	her	had
	284	10	theree	there
	284	21	program	per-program
	286	6	the	to
	288	23	teh	the
	293	22	I got	I've got
			...n'...n	don't

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

MORRIS I. KLIGMAN
SIMON A. LUBOW
LUKE J. OWENS
IRVING WOHL
MICHAEL MARDINEY
EDWARD A. BARRON
JOHN H. KNUPPEL
GEORGE WOLF
JACK GREENBERG
MURRAY PADGUG
ARTHUR RUSSELL
MORT COHEN
MURRAY DEUTSCH
JULIAN WOLF
EDWARD E. ODETTE
ROBERT G. MAIRE

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TABCIONE
EUGENE A. LEVINE
GARY WEISSBROT
JOHN BENOIT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

Date	Page	Line(s)	Error	Change To
May 2	301	22	Idid	I did
	305	2	prog-ams	programs
	310	4	Riachard	Richard
	310	22	I'	I'm
	310	24	REcord	Record
	314	24	knows.	knows?
	318	5		eliminate "w" at end of line
	318	24	Mr. Kearsh	Miss
	319	4	ground,	groundrule on cross examination.
	319	24	AS	As
	320	3	tapeshow	tape show
	320	10	Mi-s	Miss
	320a	6	fromproducers	from producers
	323	25	Kramer	Cramer
	324	2	Kramer	Cramer
	324	16	WEll	Well
	324	23	Kramar	Cramer
	325	14	Kramer	Cramer
	325	23	Kramer	Cramer

SOUTHERN DISTRICT COURT REPORTERS
Official Court Reporters
UNITED STATES COURT HOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007
CORTLANDT 7-4580

...RRIS I. KLIGMAN
...ON A. LUBOW
...RE J. OWENS
...VING WOHL
...CHAEL MARDINEY
...WARD A. BARRON
...HN H. KNUPPEL
...ORGE WOLF
...LK GREENBERG
...URRAY PADGUG
...THUR RUSSELL
...RT COHEN
...URRAY DEUTSCH
...LIAN WOLF
...WARD E. ODETTE
...BERT G. MAIRE

DANIEL HELFANT
PHIL GOLDEN
MARY McLANE EDMONDSON
JOEL HILLMAN
LAURENCE H. HENNEFELD
GUIDO TASCIONE
EUGENE A. LEVINE
GARY WEISSBROT
JOHN BENOIT

C. A. MICHAELINI
JOSEPH QUINONES
RICHARD KAUFMAN
ANNE S. BUTTNER

Date	Page	Line(s)	Error	Change To
May 2	326	2	wer	were
	326	6,9,	Kramer	Cramer
	326	8	recally w hat	recall what
	326	14	Kramer	Cramer
	325	9	Kramer	Cramer
	326	19	thathe	that he
	327	6	received	requested
	327	2,5,12, 17,23,25	Kramer	Cramer